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Status: GRANTED

Title: City of Columbia and Columbia Outdoor Advertising,  
Inc., Petitioners  
v.  
Omni Outdoor Advertising, Inc.

Docketed:  
April 26, 1990

Court: United States Court of Appeals  
for the Fourth Circuit

Counsel for petitioner: Klein, Joel I.

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Entry	Date	Note	Proceedings and Orders
1	Apr 26 1990	G	Petition for writ of certiorari filed.
2	May 29 1990		DISTRIBUTED. June 14, 1990
3	May 29 1990	X	Brief of respondent Omni Outdoor Advertising, Inc. in opposition filed.
4	Jun 5 1990	X	Reply brief of petitioners City of Columbia, et al. filed.
5	Jun 18 1990		Petition GRANTED. *****
8	Jul 25 1990		Order extending time to file brief of petitioner on the merits until August 9, 1990.
15	Aug 2 1990		DEFERRED APPENDIX
10	Aug 9 1990		Brief of petitioners City of Columbia, et al. filed.
11	Aug 9 1990		Brief amici curiae of National League of cities, et al. filed.
12	Aug 9 1990		Brief amicus curiae of Outdoor Advertising Assn. of America filed.
14	Aug 13 1990		Order extending time to file brief of respondent on the merits until September 18, 1990.
16	Aug 16 1990		Record filed.
		*	Certified record and briefs, 3 boxes, 46 volumes received.
17	Sep 14 1990		Brief amicus curiae of Associated Builders and Contractors, Inc. filed.
18	Sep 18 1990		Brief of respondent Omni Outdoor Advertising, Inc. filed.
19	Oct 2 1990		Joint appendix filed.
20	Oct 19 1990		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 28, 1990. (1ST CASE)
21	Oct 22 1990	X	Reply brief of petitioner filed.
22	Oct 23 1990		CIRCULATED.
23	Nov 28 1990		ARGUED.

89 - 1671

No.

Supreme Court, U.S.  
**FILED**

APR 26 1990

JOSEPH F. SPANIOLO  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

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CITY OF COLUMBIA  
and COLUMBIA OUTDOOR ADVERTISING, INC.,  
*Petitioners,*

v.

OMNI OUTDOOR ADVERTISING, INC.,  
*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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## QUESTIONS PRESENTED

1. Whether a municipal ordinance that satisfies the objective standard for *Parker* state action immunity articulated in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), nonetheless may come within the purview of the antitrust laws through a "co-conspirator exception" to *Parker*, which turns on the subjective motivations of government officials.

2. Whether a private party who successfully persuades a municipality to enact zoning ordinances may be subjected to antitrust liability under the *Noerr-Pennington* doctrine where the party utilized only legitimate lobbying techniques and engaged in no bribery, coercion, or other corruption of the political process.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
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The City of Columbia, South Carolina and Columbia Outdoor Advertising, Inc. petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 891 F.2d 1127, and reprinted at Pet. App. 1a. The order of the United States District Court for the District of South Carolina is unpublished, and reprinted at Pet. App. 49a.

**JURISDICTION**

The Court of Appeals entered judgment on December 15, 1989 and denied petitioners' petition for rehearing and suggestion of rehearing en banc on February 15,



1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

### STATUTES INVOLVED

The statutory provisions involved in this case are sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, which are reprinted in Pet. App. D.

### STATEMENT

This case involves a private party who successfully lobbied a city council to enact zoning ordinances that adversely affected a competitor. The court of appeals found that the city and lobbyist both violated the Sherman Act, applying a so-called "co-conspirator" exception to the *Parker v. Brown* doctrine and the "sham" exception to the *Noerr-Pennington* doctrine.

1. Columbia Outdoor Advertising, Inc. (COA) operated a billboard advertising business in the Columbia, South Carolina, market for more than forty years.<sup>1</sup> In 1981, respondent Omni Outdoor Advertising, Inc. (Omni) entered this market. COA responded by lobbying Columbia's mayor and City Council to enact a zoning ordinance regulating the construction of new billboards within the city. Pet. App. 3a-4a.

On March 10, 1982, the City passed a temporary moratorium on the construction of new billboards in the downtown area, which was to remain in effect until a comprehensive ordinance could be enacted. Shortly thereafter, on March 24, the City passed an amended version of the moratorium, requiring Council approval prior to

<sup>1</sup> Petitioner COA is owned by private individuals and has no non-wholly-owned subsidiaries. The parties at the judgment stage in the district court and in the court of appeals are all reflected in the caption. The court of appeals erroneously included in its caption a third defendant, J. Willis Cantey.

construction of any new billboard throughout the city.<sup>2</sup> In July, a state trial court declared this approval requirement unconstitutional. In September, the City enacted another ordinance, providing minimum spacing between billboards. Prior to this enactment, both Omni and COA testified on several occasions before the Council. Pet. App. 3a-4a, 14a-16a.

2. Respondent initiated this action in federal district court against petitioners alleging violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and various pendent state claims, all premised on the City's 1982 billboard ordinances. The jury found for the plaintiff, awarding damages that, when trebled, would total \$3,033,000. The district court granted petitioners' motion for judgment n.o.v. It held that the City and COA were immunized from antitrust liability under the *Parker v. Brown* and *Noerr-Pennington* doctrines. Pet. App. B. See *Parker v. Brown*, 317 U.S. 341 (1943); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

A divided panel of the Fourth Circuit reversed. The majority first found that the City enacted the ordinances pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and thus satisfied the standard for municipal *Parker* immunity announced in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985). Pet. App. 6a-9a. Despite that ruling, however, the court proceeded to hold the City liable under the Sherman Act on the theory that *Parker* was

<sup>2</sup> Prior to March 24, COA secured permits to construct billboards in areas affected by the moratorium. The record clearly reflects that the moratorium prohibited COA from exercising its permits. Ct. App. Joint Appendix at 3771. Consequently, the permits did not allow COA to "top[] off its needs," as the Fourth Circuit suggested. Pet. App. 15a.

inapplicable because the City was a co-conspirator with COA in the alleged anticompetitive acts. *Id.* at 9a-12a. According to the court, “[i]mplicit in the jury verdict was a finding that the City was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA’s commercial purposes to the detriment of competition in the billboard industry.” *Id.* at 9a.<sup>3</sup>

In reaching this conclusion, the majority reviewed the evidence and held that the jury could reasonably have found the following: (1) COA’s motive for seeking an ordinance was to prevent respondent from entering the market; (2) COA’s owner was a life-long friend of the mayor and enjoyed close personal friendships with all four members of the city council; (3) COA met personally on several occasions with the mayor to lobby for the ordinance; (4) the ordinance conformed to COA’s position; and (5) COA had a practice of offering free or discounted billboard space to numerous state and local officials, including the mayor and some council members. *Id.* at 13a-18a. This evidence, in the Fourth Circuit’s view, was sufficient to justify the conclusion that petitioners did not act “independently” and therefore became co-conspirators. *Id.* at 17a-18a.

Next, the majority held that COA was not immune from antitrust liability because its lobbying efforts fell within the “sham” exception to the *Noerr-Pennington* doctrine. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. at 144. The court reached this result based on reasoning that closely paralleled its *Parker* analysis. It stated that COA’s lobbying “‘was actually nothing more than an attempt to interfere directly with the business relations of a competitor’

<sup>3</sup> Despite its finding of liability, the Fourth Circuit held that the Local Government Antitrust Act, 15 U.S.C. §§ 34-36, limited the relief obtainable from the City to an injunction. Pet. App. 18a-20a.

or an attempt to harass and deter Omni,” Pet. App. 22a, and reiterated that the City’s officials had conspired with COA to achieve its goals, *id.* at 23a (quoting jury instructions). The court suggested an “inference[]” that COA persuaded the City to enact and defend the initial moratorium ordinance, which was later held unconstitutional, despite the contrary advice of the city attorney. *Id.* at 22a. It then held that such facts justified application of the “sham” exception on the theory that Omni, by virtue of the conspiracy, was denied “meaningful access” to the relevant governmental decisionmakers. *Id.* at 22a-23a.<sup>4</sup>

Judge Wilkins dissented. He first stated that the district court’s instruction on conspiracy was deficient because it permitted the jury to find a conspiracy based solely on COA’s alleged use of personal relationships with city officials and did not require a finding of corruption, bribery or even selfish motive on the part of the city officials. *Id.* at 39a. Judge Wilkins went on to argue that the record did not justify withholding *Parker* and *Noerr-Pennington* protection from petitioners. Since there was not a “scintilla” of evidence of illegality or fraud in the process that led to the billboard ordinances, *id.* at 44a, the *Parker* doctrine, in his view, could not be overcome on the theory that city officials acted in concert with COA or for its benefit. *Id.* at 45a-48a. For much the same reason, the dissent concluded that there was no basis for disregarding *Noerr-Pennington* principles and treating COA’s actions as something other than legitimate and protected petitioning of government. *Id.* at 39a-45a.

<sup>4</sup> The Fourth Circuit also rejected petitioners’ argument that Omni failed to establish both the relevant product market and antitrust injury. Pet. App. 24a-30a. Furthermore, the court rejected COA’s claims on cross-appeal that the jury improperly calculated damages. *Id.* at 32a-37a. Finally, the court remanded Omni’s state unfair trade practice claim for further findings. *Id.* at 30a-31a.



The panel denied petitioners' petition for rehearing and the full Fourth Circuit denied their suggestion for rehearing en banc by an evenly divided vote. *Id.* at 68a-69a.

### REASONS FOR GRANTING THE WRIT

This case presents a single central question: whether wholly legitimate and successful lobbying of city officials by a private business may, through a finding of conspiracy, become a basis of antitrust liability imposed on the business and the city. In the *Parker v. Brown* and *Noerr-Pennington* line of cases, the Court has made clear that the antitrust laws do not limit the power of a state, or a state-authorized municipality, to regulate economic activity and do not prohibit a private party from petitioning for such legislation even where its intent is purely anti-competitive. Those fundamental principles were ignored by the Fourth Circuit in this case.

The court of appeals' ruling not only is indefensible in principle but, if allowed to stand, will undercut the protections of *Parker* and *Noerr* in a whole range of contexts. Whenever a private business legitimately petitions the government for beneficial legislation, and public officials respond favorably, there will be a risk that a federal court will succumb to the temptation to penalize both parties on the theory that there was an "agreement" intended to favor one competitor over another. The inevitable result will be undue interference with the constitutionally protected petitioning, and democratic decisionmaking, that this Court has sought to protect and preserve.

Review of the Fourth Circuit's decision is particularly appropriate because that ruling is not an isolated aberration. While numerous cases from other circuits are flatly in conflict with the Fourth Circuit's approach, recent years have witnessed a pattern of decisions, particularly in the *Parker* area, denying immunity based on findings

of conspiracy between private parties and public officials. The need for further guidance from this Court is thus clear.

1. The Fourth Circuit's refusal to apply the *Parker* doctrine to immunize the City in this case simply cannot be squared with this Court's precedents. In *Parker*, the Court established that the antitrust laws do not prevent a state, acting as sovereign, from regulating economic activity, even though such regulation may have anticompetitive effects. 317 U.S. at 350-52. In *Town of Hallie*, the Court ruled that the *Parker* immunity extends to all actions of municipalities taken pursuant to a clearly articulated state policy authorizing them to displace free competition. 471 U.S. at 40.

Here, the Fourth Circuit held that the City met the *Town of Hallie* standard, reasoning that South Carolina zoning statutes "authorize municipalities freely to regulate the billboard industry" and "clearly contemplate" regulations with anticompetitive effects. Pet. App. 8a-9a. The court nevertheless rejected application of the *Parker* doctrine based on the jury's "implicit" finding that "the City was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes." *Id.* at 9a. It went on to recite the evidence of wholly legitimate interactions between the City and COA, concluding that they were a sufficient basis on which to conclude that "any political abuse [was] completely metamorphosed into an economic abuse," *id.* at 12a, because the City "acted solely to further the anticompetitive commercial purposes of private parties," *id.* at 10a.

Such an approach—taking circumstantial evidence that municipal officials acted with a subjective intent to favor a private party and transforming that evidence into a finding of an illegal "conspiracy" outside the scope of *Parker* immunity—is wholly at odds with the simple, objective test established in *Town of Hallie*. In that case,

the Court held that a municipality may lessen competition if it does so pursuant to a clearly articulated state policy. Where, as the Fourth Circuit acknowledged to be true here, a municipal ordinance would otherwise be valid under this test, there is no basis for scrutiny of the subjective reasons why city officials chose to exercise their delegated authority in a particular fashion.<sup>5</sup>

Indeed, this Court has expressly rejected an intent inquiry in a case involving a challenge to state action. In *Hoover v. Ronwin*, 466 U.S. 558 (1984), the Court stated that "where the action complained of . . . was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives." *Id.* at 579-80 (emphasis supplied). It explained that any other approach would cause States "to bear the substantial 'discovery and litigation burdens' attendant particularly upon refuting a charge of improper motive." *Id.* at 580 n.34 (quoting Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 Harv. L. Rev. 435, 451 (1981)). Although *Hoover* involved conduct of a state itself, its reasoning is equally applicable here where it has been determined, under the *Town of Hallie* standard, that the City was acting as the duly authorized agent of the State in enacting local zoning ordinances.

Calling the City's actions a product of a "conspiracy" with COA does nothing to salvage the Fourth Circuit's approach. The sole basis of this characterization was evidence showing, at most, (1) that COA sought, through wholly legal means, legislation favoring its market posi-

<sup>5</sup> In *Town of Hallie* itself, the Court rejected a requirement that a state legislature, in authorizing such municipal actions, "expressly state" that it "intends for the delegated action to have anticompetitive effects"—noting that an inquiry into legislative intent "would embroil the federal courts in the unnecessary interpretation of state statutes" and "undercut the fundamental policy of *Parker*." 471 U.S. at 43, 44 n.7. The Fourth Circuit's inquiry into municipal legislative intent would have precisely the same effects.

tion, and (2) that City officials responded to these requests because of personal relationships with COA and with the goal of preserving COA's competitive posture. The court of appeals saw these facts as demonstrating that petitioners acted in concert, rather than "independently." Pet. App. 16a-18a. As the Fourth Circuit itself acknowledged, however, nothing in the *Parker v. Brown* line of cases suggests that anticompetitive legislation must be "independent" in the sense that it does not result from suggestions made by favored private parties. *See-id.* at 12a. ("Clearly this would not preclude permissible and even desirable private meetings by concerned private persons with legislators and public administrators.") The central purpose of the *Parker* doctrine is to respect principles of federalism by preserving the right of the people, speaking through their elected state and local representatives, to enact economic regulations. These concerns do not become any less compelling simply because a jury finds that a city acted for the purpose of helping a company that engaged in legitimate lobbying efforts for its own benefit.<sup>6</sup>

<sup>6</sup> *Cf. Noerr*, 365 U.S. at 139 ("A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of importance to them.").

The case might be different, of course, if the relevant public officials had agreed to help COA in return for illegal bribes, or if the City was itself operating in the market and entered into a conspiracy to restrain trade for its own economic benefit. In *Parker* itself, the Court distinguished a case where a state, rather than acting as sovereign, becomes a "participant in a private agreement or combination by others for restraint of trade." 317 U.S. at 351-52. In so doing, the Court cited its earlier decision in *Union Pac. R.R. Co. v. United States*, 313 U.S. 450 (1941), where the defendant city was accused of taking illegal measures to divert business to a produce market it owned and operated.



As we have already suggested, the Fourth Circuit's approach is not without some support in decisions from other circuits. The court of appeals cited two cases indicating that there is a conspiracy exception to *Parker* immunity.<sup>7</sup> More recently, in *Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810 (11th Cir. 1990), *petition for cert. filed*, No. 89-1419 (March 9, 1990), the Eleventh Circuit rejected a claim of state action immunity where a state-owned hospital had denied a doctor staff privileges based on a recommendation of its peer-review committee. Applying the *Town of Hallie* standard, the court recognized that the state legislature had authorized the hospital to "displace competition" in this way, but denied *Parker* immunity on the ground that the plaintiff had alleged a conspiracy between the committee and the hospital to deny privileges for "pretextual" reasons. *Id.* at 825 ("even when state policy displaces unrestrained competition, a municipality-like entity that enters into an unauthorized conspiracy to restrain competition may not claim the protection of *Town of Hallie*").

These decisions, along with the ruling below, are directly in conflict with the position taken by at least two other circuits. The Ninth Circuit in *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 892 (9th Cir.), *cert. denied*, 109 S. Ct. 489 (1988), was faced with allegations that city officials had "acted in bad faith and as participants in a larger conspiracy" with a developer to force his competitors out of the market. The conduct involved was very similar to, but more serious than, that at issue here.<sup>8</sup> The Ninth Circuit, however, having held

<sup>7</sup> Pet. App. 10a-11a (citing *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733, 746 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983), and *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated and remanded*, 435 U.S. 992, *reinstated*, 576 F.2d 696 (5th Cir. 1978)).

<sup>8</sup> The plaintiff in *Boone* alleged that the private defendant developed close relationships with city officials; made false repre-

that the city's actions were state-authorized under *Town of Hallie*, ruled that neither the conspiracy allegation nor the related allegation of subjective bad faith was sufficient to preclude dismissal of the antitrust claims. *See also* Pet. App. 47a (Wilkins, J., dissenting) (discussing *Boone*). In so holding, the court followed its earlier ruling in *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) (Kennedy, J.), that *Parker* immunity does not depend on state officials' subjective motivations. *See also id.* at 775 ("The conspiracy allegations do not overcome the fundamental [*Parker*] immunities we have here defined and discussed.").

The Third Circuit has adopted the same approach as the Ninth in rejecting efforts to evade *Parker* immunity through claims of bad faith. *See Hancock Indus. v. Schaeffer*, 811 F.2d 225, 234-36 (3d Cir. 1987) (citing *Llewellyn*) ("subjective motivation of public decision-makers is irrelevant to state antitrust immunity analysis"); *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 997 n.7 (3d Cir.) ("The Supreme Court has never held that motivation is a factor in the 'state action' analysis" where the challenged policy is adopted by a public agency.), *cert. denied*, 459 U.S. 1022 (1982).<sup>9</sup>

2. The Fourth Circuit's second ruling—that the "sham" exception prevents application of the *Noerr-Pennington* doctrine to shield petitioner COA from antitrust liability—is also impossible to square with this Court's precedents. Here again, the Fourth Circuit re-

sentations; had secret meetings with officials culminating in an agreement to exclude plaintiff from the market; and hired some key city officials while making direct payments to others. *Boone*, 841 F.2d at 889, 894.

<sup>9</sup> As petitioners argued in the court of appeals, a determination that the City's actions were immune under *Parker* would also require a finding that COA would not be liable for conspiring with the City to produce those actions. *See City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1088 (6th Cir. 1989).

lied on evidence that COA's lobbying activities were aimed at anticompetitive goals,<sup>10</sup> and that City officials joined COA in a concerted effort to achieve these goals, thereby denying respondent Omni "meaningful access" to the City's decisionmaking process.<sup>11</sup> These factors, however, are not sufficient to transform protected petitioning of government into a Sherman Act violation.

Under the *Noerr-Pennington* doctrine, a private party may not be held liable under the antitrust laws for seeking to persuade government officials to take a particular action, even where its sole aim is to promote its own competitive position in the marketplace. Thus, the Fourth Circuit's first factor—COA's motive for undertaking its lobbying campaign—is irrelevant. "It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." *Noerr*, 365 U.S. at 139.

It follows that it is only the second factor—the alleged conspiracy—that could conceivably justify invoking the sham exception. But, just as with the Fourth Circuit's *Parker v. Brown* discussion, applying a label like "conspiracy" is no substitute for careful analysis in the *Noerr*-

<sup>10</sup> Pet. App. 22a ("[T]he facts support a jury conclusion that COA's interaction with the mayor, City administrators, and members of the Council 'was actually nothing more than an attempt to interfere directly with the business relations of a competitor' or an attempt to harass and deter Omni.")

<sup>11</sup> Pet. App. 22a-23a ("Likewise, the jury could have properly found . . . that COA's purposes were to delay Omni's entry into the market and even to deny it a meaningful access to the appropriate city administrative and legislative fora. . . . Although it is true, as COA contends, that Omni representatives met with City zoning officials and appeared before Council, the jury could well have believed that this was not truly meaningful access but merely a *pro forma* recognition of proponent views that had already been precluded by the conspiracy.")

*Pennington* context. In the absence of a showing that public officials were improperly induced or coerced into following COA's lead, characterizing COA's lobbying efforts as part of a conspiracy simply cannot make them a "sham." Indeed, if the Fourth Circuit's decision is allowed to stand, it will, for all practical purposes, eviscerate *Noerr-Pennington* protections in the political arena.

This case, first of all, is a far cry from the paradigmatic "sham" case, where a private party has pursued baseless claims with no realistic expectation of winning a favorable response but in the hope that the claims themselves will provide a competitive benefit. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931, 1941 n.10 (1988) (sham exception limited to "activity that was not genuinely intended to influence governmental action."); P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 203.1a (Supp. 1988). Here, COA's lobbying activities, far from being a "sham" in this sense, were quite successful; the favored ordinances were in fact enacted. See *Allied Tube*, 108 S. Ct. at 1938 ("The effort to influence governmental action in this case certainly cannot be characterized as a sham given the actual adoption of the 1981 Code into a number of statutes and local ordinances.").

The Fourth Circuit nevertheless took the position that successful lobbying efforts by a company may constitute a "sham" if they lead to a conspiracy with public officials. It stated that such an agreement, even if premised entirely on a voluntary response to wholly legitimate lobbying efforts, can render opposing lobbying efforts of a competitor ineffectual and thereby deny that competitor "meaningful access" to the relevant governmental entities.

The problems with such an approach are manifest. To begin with, at least after *Allied Tube*, it is clear that successful lobbying, genuinely intended to influence government, should not be analyzed under the "sham" exception. The Fourth Circuit, while not reaching the issue of a



"co-conspirator" exception to *Noerr*, Pet. App. 20, 23-24, relied on reasoning that closely mirrors those lower-court decisions finding such an exception. That reasoning, in turn, directly conflicts with the rules mandated by this Court and several other circuits.

This Court has recently rejected the view "that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." *Allied Tube*, 108 S. Ct. at 1938.<sup>12</sup> In so doing, however, it stated that the key question in such a case is the "nature of the activity" at issue, and whether in a given "context" it falls outside the scope of legitimate petitioning. *Id.* at 1939. Thus, *Noerr* would not immunize horizontal price-fixing arrangements merely because they are linked to efforts to induce public officials to act in a certain way. *Id.* at 1938-39. See *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768, 778-79 (1990). Similarly, there is no immunity if a private party engages in illegal bribery to achieve its ends. *Allied Tube*, 108 S. Ct. at 1939. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) ("There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations.") These limitations make sense because there is no reason to shield anticompetitive conduct that relies on coercion or corruption to induce a governmental response.

In this case, by contrast, the Fourth Circuit could point to nothing about the *means* used by COA to achieve its objective that would constitute a corruption of the process.<sup>13</sup> Instead, it simply noted that COA made use

<sup>12</sup> As noted above, however, at least after *Allied Tube* it is doubtful that the appropriate label for such cases is the "sham" exception.

<sup>13</sup> See Pet. App. 44a (Wilkins, J., dissenting) ("While it is true that [COA's President] and the Mayor had dinner together and met privately, there is not a scintilla of evidence that they engaged in any 'otherwise illegal' or 'fraudulent' activities.")

of its personal relationship with City officials, and then it focused almost entirely on the *results* of the lobbying campaign—i.e., the evidence suggesting that the City acted in response to COA's requests and did so in order to help COA in its competitive struggle with Omni.

Such an approach is not supported by this Court's precedents and is flatly inconsistent with numerous decisions from other circuits. These decisions take two forms. First, several circuits have held that a showing of bribery, coercion or some other form of illegal corruption of the governmental process is required before the protections of *Noerr* will be withheld.<sup>14</sup> Second, several other rulings, including the Ninth Circuit's *Boone* decision discussed above, require at least some showing of impropriety over and above an allegation of "conspiracy" with public officials.<sup>15</sup> Both of these lines of authority are in conflict with the decision below. On the other

<sup>14</sup> See *Opdyke Inv. Co. v. City of Detroit*, 883 F.2d 1265, 1273 (6th Cir. 1989); *Central Telecommunications v. TCI Cablevision, Inc.*, 800 F.2d 711, 724 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 265 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

<sup>15</sup> See *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1083 (5th Cir. 1988) ("Our reading of the cases involving the 'co-conspirator' exception demonstrates that this exception has been applied in cases where a government official or body has been influenced by the petitioner through some *corrupt* means.") (emphasis added), *cert. denied*, 109 S. Ct. 1955 (1989); *Boone v. Redevelopment Agency*, 841 F.2d at 897 ("*Noerr-Pennington* cannot be circumvented by merely alleging that a government official was involved in the alleged conspiracy"); *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d at 746; *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 230 (7th Cir. 1975) (rejecting plaintiffs' position "that an agreement to attempt to induce legislative action is a 'conspiracy,' and that if some of the 'conspirators' persuade a member of the legislative body to agree to support their cause, he becomes a 'co-conspirator' and a Sherman Act violation results").

hand, a few courts have seemed to side with the Fourth Circuit's point of view.<sup>16</sup>

This Court should resolve this important conflict, because a "conspiracy" exception would "in practice abrogate the *Noerr* doctrine," at least in a legislative context.<sup>17</sup> *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 230 (7th Cir. 1975). "It would be unlikely that any effort to influence legislative action could suc-

<sup>16</sup> See *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1566-68 (5th Cir. 1984), cert. denied, 474 U.S. 1053 (1986); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678, 687 (4th Cir. 1982) ("proof that appellants conspired to bring the chairman of the Central Planning Council and an assistant attorney general into their conspiracy, with the intent to foreclose HBC from meaningful access . . . is within the sham exception to *Noerr-Pennington*"), cert. denied, 464 U.S. 890 (1983); *Duke & Co. v. Foerster*, 521 F.2d 1277, 1282 (3d Cir. 1975). In an *amicus* brief filed in this Court in the *Affiliated Capital* case, the United States argued that "if ordinary politics is not to be the basis for antitrust liability, then politicians who engage in it cannot become conspirators by reaching accommodations with those who petition them." Brief for the United States as Amicus Curiae in No. 84-951, *Gulf Coast Cable Television Co. v. Affiliated Capital Corp.*, at 11 (filed December 2, 1985). The Government, however, counseled against review in that case, suggesting that the decision below was unclear and that the issue arose infrequently. In the present context, neither of these arguments remains tenable.

<sup>17</sup> As already noted, this Court in *Allied Tube* made clear that the significance of the tactics used to induce governmental action depends in part on the "context" in which they occur. It may be that in an adjudicatory context, where the governmental decision-maker is required to decide an issue solely on the basis of a formal record, a showing of *ex parte* meetings and agreements would, without more, constitute sufficient evidence of "corruption" of the process. In the legislative context, however, such meetings are both normal and desirable. Indeed, this Court in *Noerr* itself made clear that the immunity extends to legislative lobbyists even when they engage in unethical conduct, like deceptively promoting lobbying efforts of ostensibly neutral third parties, that might be sanctionable in some other context. 365 U.S. at 140-41. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. at 512.

ceed unless one or more members of the legislative body became . . . 'co-conspirators.'" *Id.* Put differently, under the Fourth Circuit's approach, there is no way for a company to lobby a legislature successfully without running the risk that such success, by itself, will subject it to liability as a co-conspirator with those it is seeking to persuade. The result would be a severe disincentive to engage in the very conduct that the *Noerr-Pennington* doctrine seeks to protect.

Certainly there is nothing in the Fourth Circuit's explanation of its position that would provide a valid limiting principle. It may be, as the court indicated, that the jury could reasonably have found that the City's decision to accept COA's proposals resulted from a history of friendship and mutual support between key officials and a local business. But personal relationships, and even campaign contributions,<sup>18</sup> hardly constitute "corruptions" of the normal legislative process that justify application of the antitrust laws to a local political struggle. To the contrary, "local government units such as city councils and county boards are seldom completely free from personal interest and outside influences, but the Sherman Act was not intended to regulate this type of activity." *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341, 342 (9th Cir. 1969).<sup>19</sup>

It may even be that the City Council had already decided to favor COA at the time that Omni appeared to present arguments against the ordinances. But it can hardly be true that legitimate lobbying efforts become

<sup>18</sup> Omni presented evidence that COA on occasion provided free or inexpensive billboard space to public officials. In the absence of a showing of illegality, such an "in-kind" contribution in no way undermines *Noerr-Pennington* immunity. See *Boone*, 841 F.2d at 895; *Metro Cable*, 516 F.2d at 230-31.

<sup>19</sup> See *Boone*, 841 F.2d at 894; *Metro Cable*, 516 F.2d at 223; *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications*, 858 F.2d at 1083.



antitrust violations merely because they have effectively succeeded before the opposing view has had a formal opportunity to be presented. That is a political problem, not an antitrust issue.

Finally, the court of appeals appears to have given great weight to the unsupported "inference" that COA (1) persuaded the City to pass the initial temporary moratorium on billboard construction despite legal advice to the City that it was unconstitutional and (2) successfully urged the City to defend this ordinance in court while the Council was preparing to pass a more comprehensive ordinance that has not been subject to constitutional challenge. Pet. App. 22a. Even if this statement were supported in the record, the fact that COA's views were more persuasive to the City than those of counsel would not in any way suggest that COA corrupted the process in a manner comparable to coercing officials. Nor is it tenable to suggest that COA's lobbying efforts were less than "genuine"—i.e., were aimed only at delay—simply because a state court subsequently invalidated the statute COA favored. See *Subscription Television, Inc. v. Southern California Theater Owners Ass'n*, 576 F.2d 230, 233 (9th Cir. 1978) (right to petition "would be considerably chilled by a rule which would require an advocate to predict whether the desired legislation would withstand a constitutional challenge"). In any event, the damages at issue here were in no way tied to Omni's exclusion from the market solely during the time period when the initial moratorium was in effect.

In sum, the Fourth Circuit's ruling on the *Noerr-Pennington* issue, like its analysis of *Parker* immunity, ultimately rests on an ill-defined concept of conspiracy that cannot be defended under current law and will lead inevitably to the application of antitrust statutes to regulate legitimate and routine political activity.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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## **APPENDICES**

1a

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOURTH CIRCUIT

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No. 88-1388

OMNI OUTDOOR ADVERTISING, INC.,  
*Plaintiff-Appellant,*

v.

COLUMBIA OUTDOOR ADVERTISING INC.; J. WILLIS CANTEY;  
THE CITY OF COLUMBIA,  
*Defendants-Appellees.*

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Argued May 9, 1989

Decided Dec. 15, 1989

Rehearing and Rehearing En Banc Denied Feb. 15, 1990

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Arthur Camden Lewis (Keith M. Babcock, Lewis, Babcock, Pleicones & Hawkins, Randall M. Chastain on brief), for plaintiff-appellant.

Harry Augustus Swagart, III (Swagart & Lengel, P.A., on brief), James Shelton Meggs, City Atty. (Roy D. Bates, City Atty., Heyward E. McDonald, McDonald, McKenzie, Fuller, Rubin & Miller, David W. Robinson, II, Robinson, McFadden & Moore, P.A., Columbia, S.C., on brief), for defendants-appellees.

Before SPROUSE and WILKINS, Circuit Judges, and HADEN, Chief District Judge.\*

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\* For the Southern District of West Virginia, sitting by designation.

SPROUSE, Circuit Judge:

The underlying action involves a claim by a billboard company that a rival billboard company and a city government successfully conspired to keep it out of the city. Suit was initiated in 1982 by appellant Omni Outdoor Advertising, Inc. (Omni) against the alleged conspirators, Columbia Outdoor Advertising, Inc. (COA), J. Willis Cantey, and the City of Columbia, South Carolina (City), for violation of sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, as well as pendent state claims. Omni sought treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, and damages under various state laws, including the South Carolina Unfair Trade Practice Act (UTPA), S.C.Code Ann. § 39-3-30 (Law. Co-op.1985). In addition to monetary damages, Omni sought injunctive relief, costs and attorneys' fees.

The case went to trial on an issue of Sherman Act section 1 restraint of trade, multiple issues of section 2 monopolization and an issue of unfair trade practices under the South Carolina UTPA. The jury, after a three-week trial in 1986, returned a verdict in favor of Omni, finding both the City of Columbia and COA liable for violations of sections 1 and 2 of the Sherman Act and finding COA had violated the South Carolina Unfair Trade Practices Act.

The district court awarded damages against COA in the amounts of \$600,000 for violation of section 1 of the Sherman Act, \$400,000 for violation of section 2 of the Sherman Act, and \$11,000 for violation of the South Carolina Unfair Trade Practices Act. Judgment was entered for Omni on February 7, 1986, for those amounts. Because the district court had earlier granted the City a Local Government Antitrust Act, 15 U.S.C. §§ 34-36, exclusion from damages liability, the verdict against the City awarded no monetary damages. The trial court did not then act on Omni's motion for injunctive relief against the City. The defendants timely moved for a

judgment notwithstanding the verdict or for a new trial. Some two-and-a-half years later, in November 1988, the district court granted the City's and COA's motions for judgment notwithstanding the verdict and denied Omni's motions for injunctive relief and for an order trebling the damages and attorneys' fees. Omni now appeals the grant of the JNOV and the denial of its motions.

We consider the evidence bearing on the resolution of the issues on appeal in a light most favorable to support the jury verdict. *Foster v. Tandy Corp.*, 828 F.2d 1052, 1055 (4th Cir.1987). Our expression of the evidence is, of course, shaped by the requirements of that rule.

For a period of more than forty years, COA had conducted its outdoor advertising business in the Columbia market.<sup>1</sup> It enjoyed a dominant position, owning more than ninety-five percent of the off-premises billboards in the area. Omni first tried to enter the outdoor advertising market in Columbia in 1981. It surveyed the Columbia market and determined that, COA's dominant position notwithstanding, local regulations and market gaps favored Omni's entry into the market. When informed of Omni's entry, officials of COA became alarmed and attempted to insure continuation of COA's dominant position. They investigated Omni's background of performance in other communities. COA's chairman traveled to other communities and acquired and studied copies of ordinances from other cities that imposed restrictions on outdoor advertising.

Omni's evidence showed the personal and political influence of COA's owners with state and city officials, COA threats to use that influence to block Omni from the Columbia billboard market, private meetings between COA owners and city officials, and open hostility expressed towards Omni by city officials. Representatives of both

<sup>1</sup> The relevant geographical market is Richland and Lexington Counties, South Carolina, including Columbia, South Carolina. It is referred to herein as the Columbia market.



Omni and COA met with Columbia administrators and attended meetings of the Columbia City Council, presenting their views concerning provisions of the billboard ordinances then under consideration.

On March 24, 1982, the City Council passed an ordinance which placed a moratorium on all billboard construction unless the Council expressly consented to construction, effectively blocking Omni from entering the market. A state court declared that ordinance unconstitutional. The Council passed a new ordinance on September 22, 1982, which favored COA's dominant position in the Columbia market and restricted Omni's ability to compete.

Omni, at trial and on this appeal, complained that the ordinances injured it and benefited COA by preventing Omni from constructing billboards in areas where COA already had boards. Omni alleged that COA and officials of the City of Columbia brought about passage of the ordinance in furtherance of a conspiracy to "restrain, hinder and suppress competition" between Omni and COA in the marketing of off-premises outdoor advertising space in interstate commerce. Omni also alleged that the defendants conspired to maintain a monopoly in the relevant market area to the detriment of competition, and that the City and COA did monopolize.

The district court granted the City judgment notwithstanding the verdict on the ground that the City was entitled to immunity from Sherman Act liability as established for states by the Supreme Court's decision in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) and applied to municipalities by *Parker's* progeny, e.g., *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985).

Omni, on appeal, contends that the City is not entitled to *Parker* immunity because South Carolina's authoriza-

tion for the City's billboard regulation did not extend to utilizing such regulation for anticompetitive purposes. Omni contends alternatively that the City is not entitled to *Parker* immunity because it was not acting pursuant to statutory purpose (i.e., for the public good) but solely in conspiracy with COA to drive Omni out of the billboard business and thereby restrain competition in the industry. The City, of course, disagrees with both of Omni's contentions. It argues that it is protected by *Parker's* "state action" exemption, that there is no "conspirator" exception to *Parker* immunity, and that even if there were, the evidence in this case was not sufficient to have submitted that issue to the jury.

## I

### State Action Immunity

#### *Parker v. Brown*

In *Parker*, the Supreme Court found California's anti-competitive agricultural marketing program immune from scrutiny under the Sherman Act, holding that Congress did not intend to include official state actions in the Sherman's Act prohibitory ambit. *Parker*, 317 U.S. at 350-52, 63 S.Ct. at 313-14. In subsequent decisions, however, the Court concluded that municipal action was not necessarily the equivalent of state action for the purposes of the *Parker* doctrine and developed criteria for determining when municipalities come under the doctrine's protective umbrella. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); and *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985). See generally *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S. Ct. 3110, 49 L.Ed.2d 1141 (1976); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).

The rules governing the initial determination of whether a municipality was engaged in state actions for *Parker* purposes have crystallized in *Town of Hallie*. There, the Supreme Court held that the defendant City of Eau Claire was protected by the *Parker* doctrine because its conduct was adequately authorized by state policy even though the state did not actively supervise implementation of the policy. The plaintiff town alleged that the city used its monopoly over sewage treatment to gain an additional unlawful monopoly over sewage collection and transportation services in adjacent unincorporated towns. Wisconsin statutes granted authority to cities to construct, add to, alter, and repair sewage systems, and this authority included the power to "describe with reasonable particularity the district to be [served]." 471 U.S. at 41, 105 S.Ct. at 1717. The statutes, moreover, granted cities governing public utilities the right to fix by ordinance the limits of such service in unincorporated "areas" and stated that these municipal utilities "shall have no obligation to serve beyond the area so delineated." *Id.* These authorizations to regulate, the Court concluded, were sufficient to satisfy the clear articulation requirement of the state action test. *Id.* at 44, 105 S.Ct. at 1719.

The Supreme Court said:

Municipalities . . . are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. Rather, to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State pursuant to state policy to displace competition with regulation or monopoly public service. [T]he municipality need not be able to point to a specific, detailed legislative authorization in order to assert a successful *Parker* defense to an antitrust suit. Rather, . . . it would be sufficient to obtain *Parker* immunity for a municipality to show that it acted

pursuant to a clearly articulated and affirmatively expressed state policy . . . .

*Id.* at 38-39, 105 S.Ct. at 1716-17 (citations and internal quotes and ellipses omitted).

To avail itself of the *Parker* exemption then, a municipality must show only that it is adhering to a state policy to replace competition with regulation. It need not demonstrate that it acts under legislative compulsion or that the state actively supervises the involved activity. Neither need it show that the state expressly authorizes it to engage in anticompetitive conduct so long as anticompetitive effects are a foreseeable result of the authorized actions. *Id.* 471 U.S. at 43-47, 105 S.Ct. at 1718-20.

We look therefore to the authorizing South Carolina statutes to determine if the City regulated billboards pursuant to a "clearly articulated and affirmatively expressed state policy" which "clearly contemplate[s]" that the City may affect anticompetitive conduct, and conclude that *Town of Hallie's* requirements are satisfied. South Carolina's expression of policy regarding the City's object of regulation is less focused and not as clearly articulated as that in *Town of Hallie*, but more so than that in the Home Rule Amendment in *Boulder*. The only such statutes effective at the time of the City's actions were the general zoning statutes, which did not refer specifically to billboards but did include regulation of buildings and structures within their ambit.<sup>2</sup> Billboards

<sup>2</sup> S.C.Code Ann. § 5-23-10 (Law Co-op.1976). Building and zoning regulations authorized.

For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns may by ordinance regulate and restrict the height, number of stories and size of buildings and other structures . . . .

§ 5-23-20. Division of municipality into districts.

For any or all of such purposes the local legislative body may divide the municipality into districts of such number,



are, of course, a common feature of urban life, and we think it a proper assumption that the South Carolina legislature envisioned their regulation as a "structure" and as a "use of land." Proceeding from that assumption, our analysis leads us to conclude that the statutory language discussing the grant of power and setting out its purposes is evidence of the requisite legislative policy to authorize municipalities freely to regulate the billboard industry in their area. *Cf. Pendleton Constr. Corp. v. Rockbridge County*, 652 F.Supp. 312 (W.D.Va.1987), *aff'd on its reasoning*, 837 F.2d 178 (4th Cir.1988); *Racetraac Petroleum, Inc. v. Prince George's County*, 601 F.Supp. 892, 906-10 (D.Md.1985), *aff'd*, 786 F.2d 202, 318 (4th Cir.1986).

The second prong of the *Town of Hallie* test requires that the policy "clearly contemplate" that the City may effect anticompetitive conduct. We dealt leniently with the question of legislative contemplation of an anticom-

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shape and area as may be deemed best suited to carry out the purposes of this article. Within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land . . . .

§ 6-7-710. Grant of power for zoning.

For the purposes of guiding development in accordance with existing and future needs and in order to protect, promote and improve the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare, the governing authorities of municipalities and counties may, in accordance with the conditions and procedures specified in this chapter, regulate the location, height, bulk, number of stories and size of buildings and other structures . . . . The regulations shall be made in accordance with the comprehensive plan for the jurisdiction as described in this chapter and shall be designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers, to promote the public health and the general welfare, to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to protect scenic areas; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements . . . .

petitive effect in *Coastal Neuro-Psychiatric Assocs. v. Onslow Memorial Hosp.*, 795 F.2d 340 (4th Cir.1986), which involved local restrictions on hospital staff privileges pursuant to state statute, stating:

[The] restrictions . . . may reduce the supply or variety of medical services to the surrounding community. The North Carolina legislature must have foreseen this anticompetitive consequence and decided that the regulatory benefits conferred by the statute simply outweighed it.

*Id.* at 342. We think that authority to regulate billboards, like authority to regulate hospital staff privileges, makes an anticompetitive effect of regulation substantially foreseeable and conclude that the second prong is satisfied. That, however, is not the end of our inquiry.

## II

### Denial of Immunity to Municipalities By Conspiracy Exception to *Parker*

Although we conclude that the authorization granted by the State of South Carolina to its municipalities to regulate the billboard industry normally would be sufficient to clothe the municipalities with *Parker* immunity in exercising that authority, we agree with Omni's contention that the *Parker* exemption is unavailable here. Implicit in the jury verdict was a finding that the City was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry.

In *Parker*, the Supreme Court enunciated its oft-quoted dictum, "[W]e have no question [in this case] of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." 317 U.S. at 351-52, 63 S.Ct. at 313-14. With specific reference to the facts of *Parker*, the Court stated:



The state in adopting and enforcing the . . . program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

*Id.* at 352, 63 S.Ct. at 314.

In *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945, 103 S.Ct. 2122, 77 L.Ed.2d 1303 (1983), and *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir.1977), *vacated*, 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81, *aff'd on rehearing*, 576 F.2d 696 (1978), the courts concluded that *Parker* immunity was unavailable to municipalities that acted solely to further the anticompetitive commercial purposes of private parties. In *Girardeau*, the court said:

We also disagree with the district court's holding that the state action exemption established in *Parker v. Brown* precludes any liability by the defendants as a matter of law. *Parker* immunity is intended to exempt from the antitrust laws state actions that are anticompetitive in nature. Where a restraint upon trade or monopolization is the result of valid governmental action no violation of the Sherman Act can be made out. The *Parker* doctrine applies to municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. Even if zoning in general can be characterized as state action, a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property is not in furtherance of any clearly articulated state policy.

*Id.* at 746 (citations and internal quotation marks, brackets, and ellipses omitted).

Similarly, in *Whitworth*, the Fifth Circuit said:

The mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade.

....

Plaintiff clearly alleges that the defendants enacted the ordinance for the precise purpose of excluding him from the liquor business in furtherance of their conspiracy ....

....

[T]his case appears to fall precisely within a category that the *Parker* Court specifically refrained from dealing with. As the Supreme Court put it, that case involved "no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." That is the question here.

....

It is not every governmental act that points a path to an antitrust shelter. We reject the facile conclusion that action by any public official automatically confers exemption. In *Asheville Tobacco Board of Trade, Inc. v. FTC*, 4 Cir.1959, 263 F.2d 502, 509, the court stated: ". . . such action must be state action, not individual action masquerading as state action. A state can neither authorize individuals to perform acts which violate the antitrust laws nor declare that such action is lawful."

559 F.2d at 379-81 (some citations, internal quotation marks and brackets omitted); *see also Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir.1984) (*en banc*), *cert. denied*, 474 U.S. 1053, 106 S.Ct. 788, 88 L.Ed.2d 766 (1986). *But see Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886 (9th Cir.),

*cert. denied*, — U.S. —, 109 S.Ct. 489, 102 L.Ed.2d 526 (1988).

In view of the overriding economic thrust of Sherman Act concerns, it is tempting to consider all political activity as beyond the Act's purpose or reach. Certainly, Congress did not contemplate imposing economic oversight of political abuses *per se*. Yet the language of the Sherman Act is broad enough to include the proscription of actions where politicians or political entities are involved as conspirators. Moreover, we are constrained by established interpretation from excluding from Sherman Act consideration all conspiracies which have some political coloration. If it were otherwise, the Supreme Court in post-*Parker* decisions would have given municipalities the same blanket protection it had awarded states in *Parker*. Even so, we must be very careful in these cases to assure that any political abuse has so completely metamorphosed into an economic abuse that it properly can be regulated by application of Sherman Act legal-economic procedures. In view of the jury verdict, we think that is what is involved here.

We do not have mere allegations of economic improprieties. We deal with a jury verdict which established the alleged improper acts. So viewed, the City's actions must be scrutinized under Sherman Act principles. Clearly this would not preclude permissible and even desirable private meetings by concerned private persons with legislators and public administrators. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 137-41, 81 S.Ct. 523, 529-30, 5 L.Ed.2d 464 (1961); *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 510-11, 92 S.Ct. 609, 611-12, 30 L.Ed.2d 642 (1972). What is not permissible in the *Parker* immunity context, however, is that such private contacts and agreements relate not to the purpose of attaining governmental action but solely to forcing competitors from a particular market. We must assume that is what the jury found in this case.

### III

#### Evidence Concerning Conspiracy

The City argues, however, that there was not sufficient evidence of a conspiracy to have submitted that question to a jury. The evidence, viewed with appropriate deference to the jury verdict, reflects the following pattern and sequence of events.

COA was half-owned by J. Willis Cantey from 1947 to 1974 and has been fully owned by the Cantey family since 1974. James W. Cantey, Jr., is chief executive officer. J. Willis Cantey was a life-long personal friend of Columbia's mayor, Kirkman Finlay. The Cantey family always had an excellent relationship with Mayor Finlay and the City Council, all four of whom were very good friends of the Canteys. Mayor Finlay viewed his friendship with Cantey as a political asset.

J. Willis Cantey apparently viewed his friendship with the Mayor and councilmen as a business asset. In December 1980, he wrote to Robert O. Naegele, another outdoor advertising merchant who wanted to purchase COA and who had suggested that COA upgrade its plant and seek certain ordinances:

The Mayor of Columbia and the four councilmen are very good friends of ours. I discussed your suggestion with the Mayor about reworking our existing sign ordinances and he promptly said, "no problem". My son Jim has begun a study to determine exactly what restrictive measures we should request.

Cantey testified that he sought these assurances from the Mayor regarding the desired ordinances in order to keep Naegele out of Columbia.

In January 1982, after Omni had entered the market, J. Willis Cantey again discussed billboards and ordinances with the Mayor. Then, on February 10, 1982,



James W. Cantey, Jr., wrote to William Dooner, Omni's owner:

Saturday night my father and mother had dinner with the Mayor of Columbia and his wife. They are life long friends and the Mayor expressed concern as to the increasing number of billboards in the Columbia area. We have always had an excellent relationship with the Mayor and Council and he was speaking off the record. It has always been our policy to be civic minded but low key trying to prevent any public opposition to our business. At some point, I think City Council will be forced to place some type of stringent restrictions on our industry.

The City began the process of formulating a comprehensive ordinance. In the meantime, it moved quickly to enact a moratorium that would remain in effect until the comprehensive ordinance was enacted. On March 10, 1982, an ordinance first drafted earlier that day was given its first reading and was passed by the Council. It banned construction of new billboards in certain specified downtown areas without the express prior permission of City Council. On the previous day, March 9, COA had obtained permits for billboards in locations covered by the March 10 ordinance. The City Manager testified that it was unusual to adopt an ordinance prior to having the City Attorney draft it, and admitted that the Council's action was a "drastic step."

On March 23, a meeting was scheduled between the Mayor and J. Willis Cantey. The meeting was apparently arranged at the last minute, as it was handwritten in the Mayor's handwriting on the Mayor's otherwise-typewritten schedule. On the following day, March 24, the date of the second reading of the ordinance, the City Council altered the amendment of Columbia's Off Premises Commercial Advertising ordinance, with the result that it restricted competition by banning construction of

billboards *anywhere* in the city without the Council's express consent. That provision froze the status quo, COA's dominant position in the market. After March 10 but before March 24, COA had obtained billboard permits for locations that would be included in the March 24 ban. COA contends these merely represented prudent preemptive steps. Omni argues that these actions, like those that preceded the March 10 enactment, permit an inference either of advance knowledge or of confidence that the City would act to close the door once COA had topped off its needs.

In any event, the evidence presented to the jury was probative to some degree on the issue of conspiracy. The Council passed the moratorium despite the City Attorney's earlier advice that it was unconstitutional. When Omni brought suit in state court to nullify the ordinance, the Council instructed the City Attorney to defend the suit and effect delay until a new ordinance could be enacted. On June 22, 1982, that action was heard in state court. On July 14 the Council requested that the City Manager prepare a new ordinance as quickly as possible. A preliminary version, which was reviewed by the Mayor, was prepared on July 20. In the meantime, on July 21, having received word that the state court was going to rule against the city, the Council gave first reading to a stopgap ordinance that simply banned new billboards. It would have had the effect of terminating Omni's efforts to obtain sites and erect billboards. The ordinance was not approved on second reading. On July 23, the state court declared the original March 24 ordinance unconstitutional.

The new billboard control ordinance prepared by the City Manager evolved over time. The final version was introduced on September 8, 1982 and finally enacted on September 22. It provided, *inter alia*, for a minimum spacing of 1,000 feet between billboards on the same side of a street and 500 feet between billboards on opposite



sides of a street.<sup>3</sup> The effect of this provision, given the existing COA billboards, was to block Omni from large areas of the city.

Before the new ordinance was introduced and enacted, COA submitted a proposed ordinance to the city that specified size of billboards and same-side-of-the street and opposite-side-of-the street distances between billboards in different areas of the city. The first draft of the ordinance prepared by the City tracked these provisions exactly. It and subsequent early versions of the new ordinance provided for 750-foot spacing in some areas of the City. Earlier, on October 5, 1981, in a conversation intended to convince Omni to stay out of Columbia, J. Willis Cantey had asked Omni's Dooner, "Do you think I should talk to my good friend, the Mayor, and get 1,000 foot spacing?" In a March 17, 1982, meeting between Omni, COA, and a representative of the City, the City representative had suggested 750-foot spacing. At one point during that meeting, J. Willis Cantey, irate and upset, stated that he wanted 1,000-foot spacing and was going to get it from the City Council. In the final version, the 750-foot spacing became 1,000 feet.

Cantey Heath of COA, while denying that he expected any favors, testified that COA gave free advertisements to politicians. With reference to one politician at the state level, Heath testified that, having made a friend by providing free billboard space, he would remind that friend of the free advertisement when asking him for help; with reference to another, he testified that discounted advertising rates were provided with the expectation of receiving favors in return.

<sup>3</sup> The ordinance is unartfully drafted; its language requires a minimum spacing of 1,000 feet generally. That is inconsistent with other evidence and would render the 500-foot provision senseless.

COA had given the Mayor six free billboards during his first race for mayor in 1978. At trial, immediately after J. Willis Cantey had denied knowledge of those gifts to the Mayor, he was asked about billing some politicians more than the standard rates:

Q. That's not very fair, charging one [not necessarily the Mayor] nothing and other ones more than your rate card; is it?

....

A. May be he did [COA] a favor so [COA] compensated by giving him a free board. I don't know if that happened.

Councilman Bennett, who had been appointed by the Mayor to a two-man subcommittee to deal with the billboard ordinance, and Councilman Ouzts, a friend of the Cantey family, received inexpensive billboard space during their races in 1983 and February 1984, respectively.<sup>4</sup>

Most of this evidence is uncontradicted, but COA and the City vigorously dispute whether permissible inferences of anticompetitive conduct can be drawn from it. COA and the City, of course, introduced evidence advancing neutral noncompetitive reasons for each of these events. Their problem on appeal, however, is that the jury heard all of the evidence and was required to examine the evidence in its entirety, discarding whatever testimony it considered unreliable and giving weight to all it considered credible. In that important context, and when viewed in the light most favorable to Omni, the evidence tends "to exclude the possibility" that the City and COA acted

<sup>4</sup> These boards were provided after the Council passed the restrictive billboard ordinance, which the jury found furthered the conspiracy. All parties spent considerable time, both below and on appeal, arguing the relativeness of this evidence. It is, of course, after the fact and at best had minimal probative effect. At best, when considered with COA's established practice of sometimes exchanging billboards for favors, the jury could have considered the evidence of billboard gifts in 1983 and 1984 as evidence of COA's continuing way of doing business.

independently. See *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Rather, it tends to prove that the City and COA "had a conscious commitment to a common scheme" designed to stifle competition and preserve CCA's monopoly. See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 1470, 79 L.Ed.2d 775 (1984); see also *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1562 (5th Cir. 1984) (en banc), cert. denied, 474 U.S. 1053, 106 S.Ct. 788, 88 L.Ed.2d 766 (1986). We conclude, therefore, that sufficient evidence supports the jury's finding that there was a conspiracy between the City and COA in violation of sections 1 and 2 of the Sherman Act, and therefore that the City, participating in the conspiracy solely for the purposes of restraint of trade and monopolization, was deprived of the *Parker* immunity to which it would have been entitled except for its involvement in the conspiracy.

#### IV

##### Immunity of City from Damages Remedy Local Government Antitrust Act

Although we reverse the grant of judgment notwithstanding the verdict to the City, we agree in effect with the district court's holding that the Local Government Antitrust Act (LGAA), 15 U.S.C. §§ 34-36, shields the City from a damages award, and that the relief against it is restricted to injunctive relief even though this case was commenced before September 24, 1984, the effective date of the Act.

The Act provides:

##### (a) Prohibition in general

No damages, interest on damages, costs, or attorney's fees may be recovered . . . from any local government, or official or employee thereof acting in an official capacity.

(b) Preconditions for attachment of prohibition; prima facie evidence for nonapplication of prohibition

Subsection (a) of this section shall not apply to cases commenced before the effective date of this Act [September 24, 1984] unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) of this section shall not apply.

15 U.S.C. § 35.

We think the district court could have properly considered at least the following factors: that Omni prevailing would be entitled to effective relief against the City by enjoining it from future Sherman Act violations relating to Omni; that Omni could (and subsequently did) receive a substantial damages award against COA; and that, while the jury might find that the conduct of the City officials amounted to a proscribed conspiracy, the egregiousness of the conduct was a matter the trial court could weigh. See *Kaplan v. Clear Lake City Water Auth.*, 794 F.2d 1059, 1063 (5th Cir.1986); *S. Kane & Son, Inc. v. W.R. Grace & Co.*, 623 F.Supp. 162, 163 (E.D.Pa. 1985), aff'd, 857 F.2d 1464 (3d Cir.1988); and *Huron Valley Hosp. v. City of Pontiac*, 612 F.Supp. 654, 664-65 (E.D.Mich. 1985), aff'd in part, appeal dismissed in part, 792 F.2d 563 (6th Cir.), cert. denied, 479 U.S. 885, 107 S.Ct. 278, 93 L.Ed.2d 254 (1986). We therefore find no abuse of discretion in the district court's ruling that the City is immune to damages under the LGAA.

It follows from the verdict of liability that the City was subject to an appropriate injunctive judgment. We



are not inclined as a reviewing court to fashion the provisions of an injunction as requested by Omni, but, after remand and hearing, the district court should grant Omni an appropriate injunction against the City.

# V

## Private Citizens Immunity Under *Noerr/Pennington* Doctrine

The district court grounded the judgment notwithstanding the verdict to COA on its perception that its actions were immunized from Sherman Act liability because they were in essence no more than those of a private entity petitioning its local government, and that such action was shielded from Sherman Act liability under the doctrine established by the Supreme Court in *Eastern R.R. Pres. Conf. v. Noerr Motor Freight*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *UMWA v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); and *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). Omni argues that the facts of this case as found by the jury bar COA from the immunity established in *Noerr* and expanded in *Pennington* and *California Motor*. Its argument is dually grounded on exceptions to *Noerr/Pennington* immunity that it identifies as the "sham" exception and the "co-conspirator" exception. COA counters (1) that under the proven facts COA's actions cannot be interpreted as coming within the "sham" exception, and (2) that as a matter of law there is no co-conspirator exception to *Noerr/Pennington* immunity.

We first consider Omni's contention that *Noerr/Pennington* immunity is unavailable to COA because its actions before the Council and zoning administrators of the City of Columbia were a "sham." In *Noerr*, the Supreme Court explained:

[T]here may be situations in which a publicity campaign, ostensibly directed towards influencing

governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

365 U.S. at 144, 81 S. Ct. at 533. In *California Motor*, the Court held that no immunity attaches where a defendant's petitioning is used, not to influence the governmental agency, but "to harass and deter [competitors] from having a free and unlimited access to administrative and judicial proceedings so as to deny them access to the tribunals." 404 U.S. at 515, 92 S.Ct. at 614 (quoting complaint). More recently, in *Allied Tube & Conduit v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931, 1937 n. 4, 100 L.Ed.2d 497 (1988), the Supreme Court cited *Noerr* and reiterated:

Of course, in whatever forum, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action.

In *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678, 687 (4th Cir.1982), this court said:

Actions taken to discourage and ultimately prevent competitors from meaningful access to the processes of administrative agencies fall within the sham exception to *Noerr-Pennington* immunity. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512-513, 92 S.Ct. 609, 612-613, 30 L.Ed.2d 642 (1972). Thus, proof that appellants conspired to bring the chairman of the Central Planning Council and an assistant attorney general into their conspiracy, with the intent to foreclose HBC from meaningful access to the Central Planning Council and the MCC, is within the sham exception to *Noerr-Pennington*. . . . We believe that appellants are not



immune from antitrust liability if the proof establishes they were engaged in a baseless appeal to the Superior Court of Wake County with intent to delay approval of HBC's application for a certificate of need and thereby delay its entrance into the Raleigh market.

See also *Pendleton Constr. Corp. v. Rockbridge County*, 652 F.Supp. 312, 319 (W.D. Va.1987).

COA argues that regardless of its ultimate desire to foreclose Omni from the Columbia market, its invocation of the political process to obtain a billboard spacing ordinance could not have been a "sham" as that term is defined in the controlling decisions. In the first place, we doubt if the evidence in this case supports this COA assertion. Properly construed, the evidence reflects that COA had operated in the Columbia market for some forty years under existing ordinances and had not sought substantial changes until it was threatened with competition. The changes it sought obviously inured to COA's position in its contest with the incoming competition. Construed from that perspective, the facts support a jury conclusion that COA's interaction with the mayor, City administrators, and members of the Council "was actually nothing more than an attempt to interfere directly with the business relations of a competitor" or an attempt to harass and deter Omni. Likewise, the jury could have properly found to exist the kind of circumstances we described in *Hospital Building Co.*—finding that COA's purposes were to delay Omni's entry into the market and even to deny it a meaningful access to the appropriate city administrative and legislative fora. The evidence, for example, supports inferences that COA instigated the Council's enactment of an unconstitutional ordinance even though the city attorney had advised of its probable unconstitutionality, and that COA encouraged the City's later instruction to its attorney to proceed with litigation to stall until a moratorium could be enacted. Although

it is true, as COA contends, that Omni representatives met with City zoning officials and appeared before Council, the jury could well have believed that this was not truly meaningful access but merely a *pro forma* recognition of proponent views that had already been precluded by the conspiracy.

The court instructed the jury:

We may assume that persons seeking political action do so to further their own interests. There is nothing illegal about this even when one seeks action which is intended by that person to be in that person's own advantage.

....

So, if by the evidence you find that that person involved in this case procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of the Plaintiff to the marketing area involved in this case . . . and thereby conspired, then, of course, their conduct would not be excused under the antitrust laws.

So once again an entity may engage in a legitimate lobbying [sic] committee to procure legislative [sic] even if the motive behind the lobbying is anti-competitive.

If you find Defendants conspired together with the intent to foreclose the Plaintiff from meaningful access to a legitimate decision making process with regard to the ordinances in question, then your verdict would be for the Plaintiff on that issue.

In our view, the jury verdict, in light of the instructions it received from the court, necessarily reflected its finding that COA's actions were a "sham" and, construing the evidence with appropriate deference to the verdict, it supports that finding. In view of this holding, it

is not necessary to consider the issue of whether there is a co-conspirator exception to *Noerr-Pennington* immunity.

## VI

### Relevant Product Market

COA next argues that even if we rule in favor of Omni on the *Parker* and *Noerr-Pennington* issues, it is entitled to a new trial because the trial court erroneously directed the jury to return a verdict in favor of Omni on its definition of the relevant product market. COA correctly contends that in order to sustain its Sherman Act claims, Omni was required by a preponderance of the evidence to prove the relevant market claimed to be affected. See *Satellite Television & Associated Resources v. Continental Cablevision*, 714 F.2d 351, 355 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027, 104 S.Ct. 1285, 79 L.Ed.2d 688 (1984). COA forcefully urges that the court erred in instructing that the involved product market was the outdoor advertising industry. It contends that not only did Omni fail to satisfy its burden of proving that outdoor advertising was the relevant product market but that there was evidence that the market included newspapers, television, and radio. It urges that the resolution of the product market issue was for the jury.

COA relies on the testimony of its chief executive officer, James Cantey, Jr., and its employee Clary, together with the testimony elicited on cross-examination of Omni's president and vice-president. The sum of that testimony was that all of the media competed for the advertising dollar in the relevant geographical market. However, Dooner, Omni's owner, while agreeing that outdoor advertising competed generally with other media for the advertising dollar, testified that they were separate markets. He explained that advertisers devise campaigns using different media and might employ, for example,

television, radio, and billboards in the same campaign. Dooner characterized television, radio, newspapers, and magazines as "indoor" media and billboards as "outdoor" media, pointing out that advertisers commonly allocate funds for each.<sup>5</sup>

Seminal Supreme Court cases instructing us how to define a relevant product market include *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957); and *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). The Court has effected some sequential modifications of the holdings in these cases, and rules have emerged governing the definition of relevant product market. The Court in *Brown Shoe* stated:

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.

370 U.S. at 325, 82 S.Ct. at 1523-24 (citing *du Pont*, 353 U.S. 586, 77 S.Ct. 872). It went on to introduce the rules defining submarkets. In determining the relevant product market in the Columbia area, however, we need

<sup>5</sup> He testified in relevant part:

Q. Why are they not the same type of competitor?

A. Well, in the first place in an advertising campaign an advertiser will make a decision to have several media. He may very well suggest television, radio. If it is a car dealer he may use both, they will also use billboards as a companion in advertising.

In other words, the easiest way to explain it is one is an indoor media; television, radio, newspaper, magazines. The other is outdoor. It is not uncommon to have an advertiser have a budget allocated so much for outdoor advertising, so much for radio, so much for television, others.



judge only the reasonable interchangeability and cross-elasticity of demand between outdoor advertising, on the one hand, and television, newspapers, and radio, on the other.<sup>6</sup>

The district court instructed the jury that the outdoor advertising industry was the relevant product market—in effect directing a verdict on that issue. That makes more difficult the resolution of the question of whether Omni satisfied its burden of identifying the relevant product market. In reviewing a directed verdict, we consider the decision *de novo*. *Gairola v. Virginia Dep't of General Servs.*, 753 F.2d 1281, 1285 (4th Cir.1985). Without weighing the evidence or considering the credibility of the witnesses, we must be convinced that “there can be but one conclusion as to the verdict that reasonable jurors could have reached.” *Wheatley v. Gladden*, 660 F.2d 1024, 1027 (4th Cir.1981). Viewing the procedural and factual calculus in its totality, however, we are persuaded that the district court was correct in its instruction to the jury concerning the relevant market.

COA offered sparse evidence that there was general competition between all types of media advertising. Dooner testified, in effect, that in evaluating competition for obtaining advertising contracts, other media were not substitutable for outdoor advertising. Other evidence in the record indicates that advertisers in the Columbia area using billboards did so because they could reach narrowly targeted areas and that their messages had specific and enduring attributes. COA offered no evidence concerning substitutability, cross-elasticity, or other facts which

<sup>6</sup> We decide that the outdoor advertising industry in Columbia is an appropriate product market under the *du Pont* test. We would have arrived at the same result under *Brown Shoe's* submarket concept, *i.e.*, the “practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” 370 U.S. at 325, 82 S.Ct. at 1324.

might be relevant to product market determination other than the bald statements concerning general competition. In *du Pont*, the Court stated:

Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another.

....

In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that “part of the trade or commerce,” monopolization of which may be illegal.

351 U.S. at 393-95, 76 S.Ct. at 1006-08. Cross-elasticity of demand has been defined as:

[T]he percentage change in the quantity demanded of a product resulting from a small percentage change in the price of the product.

....

The higher the cross-elasticity of demand between two products, the less will be the ability of a sole seller of one of the products to raise his price without suffering a reduction in sales volume so great as to offset the positive effect of the higher on profits.

R.A. Posner, *Antitrust* 437, 438 (1978); *see also* II P. Areeda & D. Turner, *Antitrust Law*, § 531, at 398-99 (1978).

In *NCAA v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), Justice Stevens, writing for the majority, approved a district court conclusion that college football broadcasts constituted a separate market of television programming on Saturday after-



noon. This was supported, he said, by the district court's finding "that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience," and that "the District Court's subsidiary finding that advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic characteristics is vivid evidence of the uniqueness of this product." *Id.* at 111, 104 S.Ct. at 2965 (footnotes omitted).

Although the product market discussion in *NCAA* involved the content of programs, we think that reasoning is generally applicable to advertisers' selectivity in choosing billboards, radio, television, or newspapers, singly or in combination. The patterns of competition in selling entertainment do not necessarily follow the patterns controlling competition in other industries because the qualities of specific entertainment that attract different audiences are each unique.<sup>7</sup> So too the economic utility of a particular media for a particular purpose makes statements concerning general competition between them inconclusive as to whether each is a separate product market. We think this is demonstrated in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953). There, the Court, in considering the relevant product market in a newspaper tying case, said:

<sup>7</sup> We think Professor Areeda's comment in his discussion of the case is significant:

Of course, other programming was available at lower cost, although not necessarily at lower cost per viewer attracted by the program. Indeed, with respect to any class of program—baseball, all sports, theatrical films, situation comedies—other programs are available. Yet, there seems little doubt that a hypothetical monopolist of any significant program class could elevate its price above the level that would prevail under substantial competition within that program class. P. Areeda & H. Hovenkamp, *Antitrust Law* § 525.1, at 455 (Supp. 1988).

For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose "cross-elasticities of demand" are small. Useful to that determination is, among other things, the [newspaper] trade's own characterization of the products involved. The advertising industry and its customers, for example, markedly differentiate between advertising in newspapers and in other mass media.

*Id.* at 612 n. 31, 73 S.Ct. at 882 n. 31 (citations to advertising trade journals omitted).

Our task would have been easier had the district court required the parties to produce detailed evidence concerning factors affecting substitution and cross-elasticity. The only evidence on the record, however, is that billboards in the Columbia area are not substitutable with advertising in other media and that there is little, if any, cross-elasticity of demand. We think this satisfies Omni's burden of proving a relevant market. It is the only relevant record evidence and that, together with the Supreme Court's general expressions in *NCAA* and *Times-Picayune*, persuades us that the district court did not err in directing a verdict on this discrete issue.

## VII

### Injury to Competition

COA next argues that even if the evidence established a relevant product market, Omni's evidence concerned only injury to Omni, and that there was no testimony that competition, rather than just Omni, was injured. COA, however, owned ninety-five percent of the market; no competition existed. The final ordinance not only

closed Columbia to Omni, but precluded any future competition against COA. This is a case of retention and solidification of monopoly power by the destruction of the only meaningful competitor. These are circumstances which a jury may properly consider in determining injury to competition. See *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 n. 14, 97 S.Ct. 690, 698 n. 14, 50 L.Ed.2d 701 (1977); *Ratino v. Medical Service*, 718 F.2d 1260, 1272 (4th Cir.1983).

### VIII

#### South Carolina Unfair Trade Practices Act

Omni also attacks the district court's grant of judgment notwithstanding the verdict on its state unfair trade practices claim. Section 39-5-20(a) of the Code of South Carolina states:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Section 39-5-140 provides in part:

(a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages.

The district court instructed the jury that:

A trade practice is unfair when it offends established public policy and is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

It went on with a detailed explanation of what constituted such a practice. The jury returned a verdict in favor of Omni on the UTPA count in the amount of

\$11,000 without trebling. The district court granted COA's motion for judgment notwithstanding the verdict on the UTPA count solely on its application of the rule established in *Noack Enter. v. Country Corner Interiors*, 290 S.C. 475, 351 S.E.2d 347 (1986), *cert. dismissed*, 294 S.C. 235, 363 S.E.2d 688 (1987), to the facts of this case. In *Noack*, the South Carolina Court of Appeals interpreted the Act:

To be actionable under the UTPA, . . . the unfair or deceptive act or practice in the conduct of trade or commerce must have an impact upon the public interest. The act is not available to redress a private wrong where the public interest is unaffected.

....

[U]nfair or deceptive acts or practices in the conduct of trade or commerce have an impact upon the public interest if the acts or practices have the potential for repetition.

*Id.* 351 S.E.2d at 350-51. There are no South Carolina cases on the point, but, in our view, a finding of conspiracy to restrain competition is tantamount to a finding that the underlying conduct has "an impact upon the public interest," and the district court erred in entering judgment notwithstanding the jury's verdict. In view of the court's judgment, it, of course, did not make findings concerning whether COA's acts were willful or knowing. Section 39-5-140 of the UTPA provides in part:

If the court finds that the use or employment of the unfair or deceptive methods, act or practice was a willful or knowing violation of § 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper.

On remand, the district court should make the determination required by that section.



## IX

## Damages

COA, in its cross-appeal, raises three issues relating to damages: first, that damages, if any, were caused only by COA's legitimate business acumen; second, that there was insufficient evidence as to the amount of damages; and, third, that the amounts awarded as remedies for violations of the Sherman Act counts were duplicative and inconsistent.

*(a) Causality*

The Supreme Court discussed the causality standard for market exclusion cases in some detail in *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123-25, 89 S.Ct. 1562, 1576-78, 23 L.Ed.2d 129 (1969) (citing *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946)):

[In exclusion-from-a-market cases], in the absence of more precise proof, the fact-finder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs."

We discussed the necessary causal connection between a defendant's antitrust violation and a plaintiff's damages in *Metrix Warehouse v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033 (4th Cir.1987), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1753, 100 L.Ed.2d 215 (1988):

[T]he antitrust plaintiff must demonstrate a causal connection between the defendant's violation and the damages claimed. . . . "An antitrust plaintiff is entitled to recover only for that portion of its losses caused by the defendants' unlawful conduct."

*Id.* at 1043-44 (quoting *Allegheny Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling Co.*, 690 F.2d 411, 415 (4th Cir.1982)) (internal citations omitted).

In the present case, Omni claims that its losses were caused by the ordinances which prevented it from erecting billboards in necessary locations and from selling "packages" of billboards that were required by national advertisers. COA, on the other hand, insists that Omni's losses were caused by legitimate business competition from COA. Dooner testified that all of Omni's losses were caused by anticompetitive conduct. Again, Omni's evidence was not a model for properly proving a factual issue. COA was equally deficient, offering no evidence regarding how much, if any, of Omni's losses was caused by any lawful COA conduct.

An antitrust plaintiff, of course, like any other plaintiff, has the burden of proving damages. The satisfaction *vel non* of its burden, however, is measured under a lenient standard of proof:

[T]he plaintiff may prove the extent of damages under a relaxed standard of proof . . . because estimates of the extent of damage depend on reasonable projections of the position of the plaintiff's business in the absence of the antitrust violation.

*Barber & Ross Co. v. Lifetime Doors*, 810 F.2d 1276, 1281 (4th Cir.) (citations omitted), *cert. denied*, 484 U.S. 823, 108 S.Ct. 86, 98 L.Ed.2d 48 (1987). As we explained in *Metrix*:

[A] reasonable amount of uncertainty and lack of precision is tolerable because "damage issues in [antitrust] cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." Moreover, a wrongdoing defendant should not profit at the expense of his victim



where it is his own anticompetitive conduct that precludes direct and specific proof of damage.

828 F.2d at 1043 (quoting *Zenith*, 395 U.S. at 123, 89 S.Ct. at 1577). We observed that "[t]his rationale takes on special force in market foreclosure cases because probable and inferential proof is often all that is available to hypothesize lost profits." *Id.* at 1043 n. 20. We concluded:

[W]hen the violation has been proven, "the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential, as well as upon direct and positive proof.'"

*Id.* at 1043 (quoting *Bigelow*, 327 U.S. at 264, 66 S.Ct. at 580, and *Story Parchment Co. v. Paterson Paper Co.*, 282 U.S. 555, 564, 51 S.Ct. 248, 251, 75 L.Ed. 544 (1931)).

We think Omni adequately carried its initial evidentiary burden. When COA claimed that Omni's decline in profits and values was attributable to causes other than COA's anticompetitive activities, the burden was on COA to offer that evidence, which was primarily in its possession.\* See *id.* at 1044-45; *Knutson v. Daily Review*, 548 F.2d 795, 811 (9th Cir.1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977), *reaff'd*, *Northwest Publications v. Crumb*, 752 F.2d 473, 477 (9th Cir. 1985); *Farley Transp. v. Sante Fe Trail Transp. Co.*, 786 F.2d 1342, 1352 (9th Cir.1985). We agree with the Eighth Circuit's reasoning that the inseparability of causes created by a wrongdoer should not redound against the victim:

\* This is, of course, not so when the "other causes" include factors that are internal to plaintiff or general in the market. See *Eastern Auto Distrib. v. Peugeot Motors*, 795 F.2d 329, 338 (4th Cir.1986); accord *United States Football League v. National Football League*, 842 F.2d 1335, 1378-79 (2d Cir.1988).

[T]he fact that the . . . illegal conspiracy was composed of lawful and unlawful conduct so tightly intertwined as to make it difficult to determine which portion of the damages claimed were caused by the unlawful conduct should not diminish the recovery. Similarly, the Court should recognize that the harmful consequences of certain unlawful conduct may have been exacerbated by otherwise lawful conduct. In such a situation, the fact that lawful conduct contributed to additional injury should not prohibit recovery for that injury.

*National Farmers' Org. v. Associated Milk Producers*, 850 F.2d 1286, 1307 (8th Cir.1988), *cert. denied*, — U.S. —, 109 S.Ct. 1535, 103 L.Ed.2d 840 (1989).

(b) *Sufficiency of Evidence Supporting Amount of Damages Award*

We think the jury verdict, including the amount of damages it awarded, was based on sufficient evidence. William Dooner, from an extensive background in the billboard industry, testified about two kinds of damage: (1) discrepancy between actual and projected income; and (2) decreased value of Omni's physical plant (billboards). The testimony included his reasoning and basis for arriving at lost income and the value of the physical plant.

Dooner, in his testimony, demonstrated Omni's projected sales for the involved period, providing the basis for his projections and calculating projected sales at \$1,755,000. He stated, however, that actual sales amounted to only \$585,000—resulting in an income shortfall or loss of \$1,111,804. As a basis for his valuation of Omni's plant, Dooner testified that in Atlanta and Austin, Texas, Omni had earlier sold its physical plants for forty times the value of monthly sales. For Columbia, however, he projected the resale value of an ongoing outdoor advertising business as thirty-six times monthly sales (three times

annual sales). He explained that his projected sales for 1984 were \$819,000 but that COA's unfair practices caused his actual sales for 1984 to total only \$585,000. Using that formula, which he described as based on industry practices, Dooner testified that Omni's plant value would have been \$2,457,000 (three times projected sales of \$819,000) had it not been reduced by the effect of the ordinance. He explained, however, that Omni's actual value was \$1,755,000 (three times actual sales of \$585,000), leaving a loss of \$702,000 in plant value caused by the ordinance's effect. He added the loss of income and plant value to conclude that Omni's entire loss attributable to COA's conduct was \$1,813,804. We think this evidence was sufficient to support the jury award of \$600,000 on the section 1 violations and \$400,000 for the section 2 violations.

*(c) Consistency of Sherman Act Damages Award*

The third damages issue raised by COA relates to its contention that the Sherman Act damage award was inconsistent and duplicative. The jury awarded \$600,000 on the section 1 claim and \$400,000 on the section 2 claim. COA argues that, since both claims were premised on the same alleged conduct and injuries, the awards are inconsistent. We disagree. It is true, of course, that much of the damages suffered by Omni as a result of COA's monopolistic activities would have been incurred even if it had done nothing in restraint of trade. We can conceive of different effects flowing from the two types of activities, however, and think there was sufficient evidence upon which the jury could have awarded separate damages for each violation. COA owned ninety-five percent of the local billboard market when Omni entered the local area. Obviously, Omni could have been, either legally or illegally damaged by its competitor's monopolistic position. Conceivably, however, even though damaged, it could have survived and perhaps even prospered—if its principal

competitive obstacle was solely COA's monopolistic control. The jury could have found additionally that COA's conspiring with governing city officials to restrain competition even beyond its monopolistic position constituted added increments of damages.

Finally, we find no sufficient merit to warrant reversal in the defendants' broadside attack on the district court's instructions.

X

Summary

In conclusion, we reverse the district court's grant of judgment notwithstanding the verdict to the City. We agree that it is shielded from a damages award; however, we remand for entry of appropriate injunctive relief.

We also reverse the district court's grant of judgment notwithstanding the verdict to COA and reinstate the jury's award of damages. On remand, the district court should consider Omni's motion for treble damages and attorney fees under the Sherman Act and South Carolina Unfair Trade Practices Act.

REVERSED AND REMANDED.

WILKINS, Circuit Judge, dissenting:

I write not to suggest that the activities of the defendants present a model of good government for civics class instruction. I would affirm the district court simply because the facts do not support a finding of Sherman Act violations.

The majority holds COA liable for its successful lobbying efforts under the "sham" exception to *Noerr-Pennington* immunity. Additionally, the majority holds that the city is not shielded by *Parker* immunity from the federal antitrust laws even though the ordinances passed were pursuant to a clearly articulated state policy to replace competition with regulation. Because the evidence is not



sufficient for a jury to displace either *Noerr-Pennington* immunity, under the sham or co-conspirator exceptions, or *Parker* immunity, under the conspiracy exception, I respectfully dissent.

### I.

According to the record, J. Willis Cantey, the half-owner of COA, and the Mayor of Columbia were personal friends. When Omni expressed its intent to enter the Columbia billboard market, COA became alarmed and Cantey used his personal relationship with the Mayor and other members of the Columbia City Council to secure passage of ordinances designed to substantially foreclose Omni from the Columbia billboard market. Telephone calls and letters from Cantey to Omni revealed that Cantey was confident that he could influence the city officials to pass anticompetitive billboard ordinances. Cantey submitted language for proposed ordinances which the City Council incorporated in the ordinances it enacted. The record showed that a moratorium ordinance was passed quickly despite warnings from the City Attorney that it was unconstitutional. The city instructed the City Attorney to defend a lawsuit challenging the ordinance even though the City Attorney again advised that in his opinion the ordinance was unconstitutional. The timing of the actions and inactions of the city was suspiciously close to the private meetings and telephone calls made by Cantey to the Mayor. And, the record contains evidence which could lead to the conclusion that the Mayor harbored antagonistic feelings toward Omni. Finally, there was evidence that the Mayor and other members of the City Council received in kind political contributions from COA.

From this evidence, one could reasonably conclude that the anticompetitive billboard ordinances were passed in large measure because of Cantey's lobbying efforts and his personal relationship with the Mayor and other members

of the City Council. But this is not sufficient to strip the defendants of antitrust immunity.

The majority quotes extensively from the charge given by the district court to the jury. In my view the charge was incomplete due to the general way "conspiracy" was described. No limiting factors, such as evidence of illegal acts like bribery or kickbacks or evidence of selfish or corrupt motive, were included in the description of the conspiracy exception in order to guide the jury. The jury could have concluded, therefore, that lobbying, which resulted in anticompetitive billboard ordinances and rested primarily on the lobbyist's personal relationship with elected officials, was sufficient evidence upon which to find a "conspiracy." Because of the questionable charge, I attach less faith in the verdict of the jury than does the majority.

However, remand would be inappropriate for the evidence in the record is insufficient to support the verdict even if a more definite charge had been given. At no time did COA employees threaten anyone or use otherwise coercive tactics. No one engaged in deception or misrepresentation to secure passage of the billboard ordinances. There was no evidence of any illegal conduct such as bribery, coercion, violence, kickbacks, or the like. Neither the Mayor nor the City Council members stood to gain any personal financial advantage by passing the billboard ordinances nor was there any evidence of any other selfish or otherwise corrupt motive. Without some evidence of activity such as this, I would affirm the district court and hold that antitrust immunity attached.

### II.

The district court held that COA was immune from antitrust liability under *Noerr-Pennington* immunity. I agree.



In *Noerr*, 365 U.S. 127, 81 S.Ct. 523, the Court stated:

In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

*Id.* at 137, 81 S.Ct. at 529. Thus, the Supreme Court has held that lobbying efforts directed at public officials, even if based solely on an anticompetitive motive, are not violative of the federal antitrust laws. *Id.* at 139, 81 S.Ct. at 530. See also *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965) ("Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.").

However, not all efforts ostensibly directed toward influencing governmental action are protected. When the action "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor [then] the application of the Sherman Act would be justified." *Noerr*, 365 U.S. at 144, 81 S.Ct. at 533. The Supreme Court last applied the sham exception in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). In *California Motor* the defendants abused the governmental process by filing vexatious, serial litigation designed not to win victories in the adjudicatory process, but to harass and delay competitors from entering the California trucking market. The Court ruled

that the use of the adjudicatory process in this manner was designed to directly injure the competition, not by way of litigation victories, but by way of the litigation process itself.

In *MCI Communications Corp. v. AT & T Co.*, 708 F.2d 1081 (7th Cir.) cert. denied, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983), the court stated:

Without a doubt, the intention to harm a competitor is not sufficient to make litigation or administrative proceedings a sham. That anticompetitive motive is the very matter protected under *Noerr-Pennington*. Rather, the requisite motive for the sham exception is the intent to harm one's competitors not by the result of the litigation but by the simple fact of the institution of litigation.

*Id.* at 1156 (quoting *City of Gainesville v. Florida Power & Light Co.*, 488 F.Supp. 1258, 1265-66 (S.D.Fla.1980)) (emphasis in original). Therefore, contrary to the view of the majority, the "sham" exception refers to invocation of governmental process not to achieve the legitimate outcome of the process, but as a weapon to directly injure competitors.

The majority relies on language from *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678 (4th Cir. 1982) (*HBC II*),<sup>1</sup> to define the scope of the sham exception in our circuit. However, *HBC II* is distinguishable for it involved "baseless appeals" of the administrative process "with intent to delay . . . entrance into the . . . market." *Id.* at 687.

Though not cited by the majority, this circuit has recently refined the breadth of the sham exception in *Hos-*

<sup>1</sup> Prior proceedings are reported in *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 511 F.2d 678 (4th Cir.1975), rev'd, 425 U.S. 738, 96 S.Ct. 1818, 48 L.Ed.2d 338 (1976) (*HBC I*); 691 F.2d 678 (4th Cir.1982) (*HBC II*); and 791 F.2d 288 (4th Cir.1986) (*HBC III*).

*pital Bldg. Co. v. Trustees of Rex Hosp.*, 791 F.2d 288 (4th Cir.1986) (*HBC III*). In *HBC III* this court accepted Professor Areeda's explanation of a sham:

[T]he basis concept [of the sham exception], as employed by the Supreme Court, is that the defendant's activity was intended to injure the plaintiff directly rather than through a governmental decision. When the antitrust defendant had not truly sought to influence a governmental decision, his invocation of governmental machinery is a sham. To be sure, he would always be pleased to obtain a governmental decision against his rival. But where he had no reasonable expectation of obtaining the favorable ruling, his effort to do so was a sham.

*Id.* at 292 (quoting P. Areeda, *Antitrust Law*, ¶ 203.1a (Supp.1982)) (emphasis added). Professor Areeda's definition is not inconsistent with the language of *HBC II* when read in context with the facts of that case.

The lobbying efforts of COA do not meet the definition of a sham as explained in *HBC III*. COA genuinely lobbied for ordinances which, if passed, would substantially foreclose Omni from the Columbia market. Not only did COA expect favorable results from its lobbying efforts, it was in fact successful in obtaining the billboard ordinances it sought. Nor was the injury to Omni inflicted directly by the COA lobbying efforts. Rather, any injury inflicted was by governmental action—the enactment of the billboard ordinances.

### III.

Neither does the co-conspirator-exception to *Noerr-Pennington* immunity strip COA of its immunity.

The district court recognized that some courts would find a violation when the anticompetitive lobbying goes beyond "official persuasion" to reach the point of a scheme to restrain trade. See *Duke & Co. v. Foerster*, 521 F.2d

1277, 1282 (3d Cir.1975). Even if one were to follow *Duke I* I do not think the activities of COA here went beyond the tenuous line. It is fair to infer from the evidence that Cantey used to his advantage his personal relationship with city officials and persuaded them to pass the anticompetitive billboard ordinances. But if the outcome of lobbying efforts is the passage of objectionable legislation, the proper remedy lies with the political process.

Because I do not think that the term "official persuasion" precisely defines actionable lobbying techniques, I agree with the district court that "official persuasion," as used in *Duke*, is too broad. The district court correctly stated it did not follow the *Duke* opinion because it feared that the general definition of illegal lobbying, beyond "official persuasion," would emasculate the *Noerr-Pennington* immunity doctrine. In so ruling, the district court found other authorities more persuasive. Other circuits addressing the co-conspirator exception issue have erected more precise evidentiary hurdles than were articulated by the Third Circuit in *Duke*.

In *Video Int'l Prod. v. Warner-Amex Cable Communications*, 858 F.2d 1075 (5th Cir.1988), cert. denied, — U.S. —, 109 S.Ct. 1955, 104 L.Ed.2d 424 (1989), the court stated:

Although [the defendant] argues that the [co-conspirator] exception will not apply unless [the defendant] used coercion or bribery to obtain its end, we do not believe the exception is so restricted. At the same time, however, we do find that the cases indicate that the official with whom the petitioner conspires must, at a minimum, have had some selfish or otherwise corrupt motive in siding with the petitioner to result in an illegal conspiracy sufficient to activate the co-conspirator exception.

*Id.* at 1083. Not only is there no evidence of illegal conduct, there is also no evidence of a selfish or otherwise



corrupt motive on the part of the Mayor or members of the City Council.

In *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886 (9th Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 489, 102 L.Ed.2d 526 (1988), the court held that private meetings between government officials and a lobbyist proved nothing other than a classic case for application of the *Noerr-Pennington* doctrine. *Id.* at 894-95. The *Boone* court stated that without evidence that the defendant did something "otherwise illegal" its actions fell within the *Noerr-Pennington* immunity. *Id.* at 895. Likewise, in *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir.1982), *cert. denied*, 461 U.S. 945, 103 S.Ct. 2122, 77 L.Ed.2d 1303 (1983), the court stated that "the defendants may not be protected by *Noerr* because their legitimate lobbying efforts may have been accompanied by illegal or fraudulent actions." *Id.* at 746.

While it is true that Cantey and the Mayor had dinner together and met privately, there is not a scintilla of evidence that they engaged in any "otherwise illegal" or "fraudulent" activities.

Professor Areeda, in his treatise on antitrust law, recognized the need to control the scope of the co-conspirator exception.

If the conspiracy notion means anything . . . , it can embrace nothing more than corrupt or bad faith decisions, the proof of which must be controlled in order to assure the proper functioning of official agencies. Fortunately, a careful definition of the relevant corruption or bad faith will dispose of many of the cases.

P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 203.3c (Supp.1988). In his discussion regarding whether decisions based on personal bias or campaign contributions constituted bribery and were, therefore, sufficient to strip

the lobbyist of antitrust immunity, Professor Areeda wrote:

This is not the place for an elaborate definition of bribery and whether it should include campaign contributions or other assistance to the official before or during his official tenure. Perhaps it is enough to say that these customary incidents of public life are not usually thought to impugn the legality of official acts. If official action is not invalidated by such events standing alone, neither should the casting of the challenge in antitrust terms call for invalidity or damages.

*Id.* I agree, for to do otherwise is to give those who lose political battles a ticket to explore the subjective motivations of political decision-makers by filing federal antitrust suits in which it is alleged that private meetings took place, that a personal friendship between the officials and the plaintiff's competition existed, and that an anti-competitive regulation was enacted.

#### IV.

The district court held that the city was immune from the antitrust laws under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985). I agree.

The heart of *Parker* immunity is federalism. In *Parker*, the Court stated: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker*, 317 U.S. at 351, 63 S.Ct. at 313. In *Parker* the Court held that the acts of a state, as sovereign, are immune from the federal antitrust laws. *Id.* at 352, 63 S.Ct. at 314.



In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the Court established a two-prong test to determine whether a private party is entitled to the state action exemption from the Sherman Act under the *Parker* doctrine. First, there must be a clearly articulated state policy to displace competition with regulation. *Id.* 445 U.S. at 105, 100 S.Ct. at 943. Second, the state must actively supervise the activity. *Id.*

The Court refined the *Midcal* test in determining whether a municipality was entitled to *Parker* immunity in its *Hallie* decision. The Court held that municipalities are not required to meet the additional burden, imposed on private parties under *Midcal*, of proving active state supervision.<sup>2</sup> The Court stated "[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement." *Hallie*, 471 U.S. at 47, 105 S. Ct. at 1720 (emphasis in original). While the majority agrees that the City Council was acting pursuant to a clearly articulated state policy, it nevertheless holds that the city is stripped of its *Parker* immunity.

I fear that the holding of the majority may invite heretofore unauthorized federal antitrust lawsuits against municipalities. Losers in political battles will be able to achieve all or some of their objectives by threatening antitrust litigation and, in the process, discourage public officials from performing their public duties while they contend with antitrust allegations.

The principles of federalism have guided other courts in limiting or foreclosing the conspiracy exception to

<sup>2</sup> The Court stated that active supervision prevents "a State from circumventing the Sherman Act's proscriptions 'by casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.'" *Hallie*, 471 U.S. at 46-47, 105 S.Ct. at 1720 (quoting *Midcal*, 445 U.S. at 106, 100 S.Ct. at 943).

*Parker*. The court in *Boone* rejected a claim that allegations of bad faith would strip the city of its antitrust immunity:

The availability of *Parker* immunity . . . does not depend on the subjective motivations of the individual actors, but rather on the satisfaction of the objective standards set forth in *Parker* and authorities which interpret it. This must be so if the state action exemption is to remain faithful to its foundations in federalism and state sovereignty. A contrary conclusion would compel the federal courts to intrude upon internal state affairs whenever a plaintiff could present colorable allegations of bad faith on the part of defendants.

*Boone*, 841 F.2d at 892 (quoting *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985)); accord *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 234 (3d Cir.1987) (quoting the same passage from *Llewellyn*, 765 F.2d at 774).

The Supreme Court has also expressed concern that if *Parker* antitrust immunity is easily avoided, then antitrust litigation may have a discouraging effect on public service. In *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984), the Supreme Court considered an allegation that the Arizona Committee on Bar Examinations, a private entity advising the Arizona Supreme Court, entered into a scheme to reduce competition within the legal community by raising the qualifying score on bar exams for the purpose of controlling the number of attorneys admitted to practice law within the state. The Supreme Court stated that "to look behind the actions of state sovereigns and base . . . claims of perceived conspiracies to restrain trade among the committees, commissions, or others" would emasculate the *Parker v. Brown* doctrine. *Id.* 466 U.S. at 580, 104 S.Ct. at 2001.

The majority cites several pre-*Hallie* cases for the proposition that there is a conspiracy exception to *Parker* immunity. While I have some doubt about the validity of these pre-*Hallie* cases as authority for the position of the majority, even if a conspiracy exception remains after *Hallie*, absent some proof of an illegal act or a selfish or a corrupt motive on the part of Columbia city officials, I would hold that the evidence is insufficient to strip the officials of immunity.

## V.

Omni also charged that the defendants violated the South Carolina Unfair Trade Practices Act (UTPA), S.C.Code Ann. §§ 39-5-10 to 39-5-160 (Law. Co-op.1976). I would hold that the district court correctly ruled that the claim was precluded by *Noack Enter. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 351 S.E.2d 347 (1986). Section 39-5-20(b) of the UTPA states that the intent of the state legislature was for courts interpreting the UTPA to follow interpretations of the antitrust laws by the Federal Trade Commission and the federal courts. It follows, therefore, that the South Carolina legislature intended that courts interpret the UTPA in light of *Noerr-Pennington* and *Parker*.

## APPENDIX B\*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

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Civil Action No. 82-2872-0

OMNI OUTDOOR ADVERTISING, INC.,  
-vs- Plaintiff,

COLUMBIA OUTDOOR ADVERTISING, INC.,  
J. WILLIS CANTEY and  
THE CITY OF COLUMBIA,  
Defendants.

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ORDER

[Filed Nov. 17, 1989]

This antitrust action proceeded to trial before the Court and a jury which returned a verdict for the plaintiff against the defendants Columbia Outdoor Advertising, Inc. and the City of Columbia. The matter is now before the Court pursuant to motions by the parties as follows:

1. Motion by the defendant City of Columbia for Judgment Notwithstanding the Verdict.
2. Motion by defendant City of Columbia Outdoor Advertising, Inc. for Judgment Notwithstanding the Verdict or, in the alternative, for a New Trial or a New Trial *Nisi*.
3. Motion by the plaintiff Omni Outdoor Advertising, Inc. for Injunctive Relief.
4. Motion by the plaintiff for an order trebling the damages and attorneys fees against the defendant Columbia Outdoor Advertising, Inc.

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This order will discuss and dispose of all pending motions.

# I.

This controversy began to unfold when the plaintiff Omni Outdoor Advertising, Inc. (Omni) first sought to enter the outdoor advertising market surrounding Columbia, South Carolina in the fall of 1981. At that time and for a period of more than twenty-five (25) years, defendant Columbia Outdoor Advertising, Inc. (COA) had conducted its outdoor advertising business in the Columbia market and elsewhere in South Carolina. The evidence suggests that COA enjoyed a dominant position in the market at that time, owning more than 95% of the billboards in the market. It is not disputed that when informed of Omni's entry into the market, officials of COA became alarmed and that they attempted to insure continuation of COA's dominant position in the market. The evidence as to the extent of COA's efforts is in dispute. However, it does appear that COA's chairman had one or more meetings with city officials and engaged in discussions concerning outdoor advertising within the city. It is also apparent from the evidence at trial that representatives of both Omni and COA attended meetings of the Columbia City Council and presented their views concerning provisions of the ordinances then under consideration. Omni argues that the Mayor and members of City Council were less cordial to its representatives than they were to COA's representatives on those occasions. In 1982 the City of Columbia passed three ordinances pertaining to outdoor advertising. The last of these ordinances, enacted on September 8, 1982 contains standards which regulate the construction of billboards in the City of Columbia. Omni complains that this last ordinance adversely impacts on it and benefits COA by preventing the plaintiffs from constructing additional billboards in areas where COA has already erected its boards. Omni alleges that the conduct of COA, its chairman and elected officials of the City of Columbia in bring-

ing about passage of these ordinances was done in furtherance of a conspiracy to "restrain, hinder and suppress competition" between Omni and COA in the marketing of off premises outdoor advertising space in interstate commerce. Omni also alleges that the defendants conspired to maintain a monopoly in the relevant market area to the detriment of competition therein; and that the defendants have monopolized. Omni seeks treble damages under the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2 and under a plethora of pendent state claims, including violation of the South Carolina Unfair Trade Practice Law S.C. Code Ann. § 39-3-10. In addition to its prayer for monetary damages plaintiff seeks injunctive relief together with costs and attorneys fees.

The defendants deny that they have conspired as alleged by the plaintiff and they allege that all action taken by them is lawful and proper. Additionally, the City of Columbia alleges that it is immune from this suit under the state action exemption to antitrust liability enunciated in *Parker v. Brown*, 317 U.S. 341 (1943). Moreover, defendants deny that they have monopolized or that they have contravened South Carolina law in the manner alleged by the plaintiff. COA alleges that action by it, if any, seeking the passage of legislation cannot form the basis for a suit for damages.

The jury found for Omni against both the City of Columbia and COA. The verdict against the City awarded no monetary damages and it applied to counts I and II of the Complaint which alleged that the defendants violated 15 U.S.C. §§ 1 and 2. Plaintiff was awarded damages against COA in the total sum of One Million Eleven Thousand (\$1,011,000.00) Dollars.<sup>1</sup>

<sup>1</sup> Plaintiff was awarded damages against COA of Six Hundred Thousand (\$600,000.00) Dollars under Count I, Four Hundred Thousand (\$400,000.00) Dollars under Count II and Eleven Thousand (\$11,000.00) Dollars as to Count VIII.



## II.

THE CITY OF COLUMBIA'S MOTION FOR  
JUDGMENT NOTWITHSTANDING THE VERDICT

The City moves for judgment notwithstanding the verdict under Rule 56, F.R.Civ.P. upon several grounds, among which is its contention that in enacting the ordinance of which Omni complains, the city is exempt from liability under the State action exemption to anti-trust liability recognized in *Parker v. Brown*, 317 U.S. 341 (1943).<sup>2</sup>

As it has consistently maintained throughout this proceeding, the city argues that the evidence displays that its enactment of the ordinances was accomplished pursuant to "a clearly articulated and affirmatively expressed state policy." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). Therefore, the City argues, it is entitled to judgment in its favor.

In *Parker v. Brown*, the Supreme Court held that anticompetitive conduct of a State acting through its legislature was beyond the reach of Sherman Act. 317 U.S. at 350-351. The Court observed that the Sherman Act was intended to prohibit private restraints on trade, and it refused to infer an intent to "nullify a state's control over its officers and agents" in activities directed by the legislature. Crucial to the Court's holding in *Parker v. Brown* are the principles of federalism and state sovereignty. *Id.* U.S. at 360. "Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1986). See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). "Rather, to

<sup>2</sup> The City's remaining grounds for relief include assertions that the evidence does not establish that the City conspired with COA; that the plaintiff failed to prove the existence of a relevant product market; that the plaintiff failed to prove damages.

obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State pursuant to state policy to displace competition with regulation or monopoly public service," *Town of Hallie v. City of Eau Claire*, 471 U.S. at 39. Thus, a municipality that demonstrates it has acted pursuant to a "clearly articulated and affirmatively expressed state policy" that was actively supervised "by the State is not subject to liability under the Sherman Act." *Id.* at 39 *City of Lafayette v. Louisiana Power & Light Company*, 435 U.S. 389 (1978).

Here, the City points to several South Carolina statutes which, in its view, constitute "clearly articulated and affirmatively expressed state policy." Thus, as to areas adjacent to interstate and Federal-aid primary systems declared by Congress, South Carolina has provided in S.C. Code Ann. § 57-25-130 that

.... to prevent unreasonable distraction of operators of motor vehicles, to prevent confusion with regard to traffic lights, signs or signals or otherwise interfere with the effectiveness of traffic regulations to promote the property, economic well-being, and general welfare of the State, to promote the safety, convenience and enjoyment of travel on, and protection of the public investment in highways within this State, and to preserve and enhance the natural science beauty or aesthetic features of the highways and adjacent areas, the General Assembly hereby declares it to be the policy of this State that the erection and maintenance of outdoor advertising signs, displays and devices in areas adjacent to the rights-of-way of the interstate and Federal-aid primary systems within this State shall be regulated in accordance with the terms of this article which provides for standards consistent with customary use in this State; and finds that all outdoor advertising devices which do not conform to the requirements of this article are illegal. . . .

Additionally, South Carolina has given municipalities authority to enact ordinances which "regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes." S.C. Code Ann. § 5-23-10. And it has provided for the division of municipalities into "districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article." (emphasis added) and within such district to "regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land," S.C. Code Ann. § 5-23-20. South Carolina has given local governments the power to engage in both regional and local planning and has declared that its intent is to "enable municipalities and counties . . . to preserve and enhance their present advantages, to overcome their present handicaps, and to prevent or minimize such future problems as many be foreseen." S.C. Code Ann. § 6-7-10. This statute further provides that:

To accomplish this intent local governments are encouraged to plan for future development; to prepare, adopt, and from time to time revise, a comprehensive plan to guide future local development. . . . As aids in the implementation of the comprehensive plan local governments are encouraged to adopt and enforce appropriate land use controls, and cooperate with other governmental authorities.

The provisions of this chapter are declared to be necessary for the promotion, protection, and improvement of the public health, safety, comfort, good order, appearance, convenience, prosperity, morals, and general welfare. . . .

Omni argues that the City cannot prevail on its motion because municipalities are not beyond the reach of

the antitrust laws and because the evidence established that some elected officials of the City conspired with COA for the purpose of preventing or restricting Omni's entry into the Columbia market area. Omni also argues that the state statutes relied on by the City do not set forth any clearly articulated and affirmatively expressed state policy that embraces the City's conduct. Instead, in Omni's view, these statutes are neutral and similar to the Colorado Home Rule statute which the Court considered in *Community Communications Company, Inc. v. City of Boulder, Colorado*, 455 U.S. 40 (1982) and held not to affirmatively express and clearly articulate state policy.

While it is true that a jury has found that the City and COA conspired to restrain Omni's entry into the market and that they conspired to monopolize the outdoor advertising business in the Columbia market area, the Supreme Court has held that the City is not liable if it acted pursuant to a clearly articulated and affirmatively expressed state policy which, but for the state action exemption, was anticompetitive. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). Omni argues that South Carolina has not conferred a *Parker v. Brown* exemption upon the City. Examination of South Carolina statutory law suggest that Omni's argument fails. South Carolina has declared its intent to "enable municipalities . . . to enhance their present advantages, to overcome their present handicaps and to prevent or minimize such future problems as may be foreseen." S.C. Code Ann. § 6-7-10. Clearly, § 6-7-10 contemplates that a municipality may engage in anticompetitive conduct by enacting ordinances which regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied . . . and the location and use of building and other structures." Furthermore, under the statute local governments are encouraged to do a variety of things to plan



for future development, including the adoption of appropriate land use controls, all of which South Carolina declares "to be necessary for the promotion, protection, and improvement of the public health, safety, comfort, good order, appearance, convenience, prosperity, morals and general welfare. . . ." S.C. Code Ann. § 6-7-10. Under this statute, South Carolina municipalities have broad authority to regulate land use and take other action to "overcome their present handicaps and to prevent or minimize such future problems as many be foreseen." *Id.* It may not be gainsaid that authority to regulate land uses for the purpose included in this statute envisions the power to take anticompetitive action. Clearly, "anticompetitive effects logically would result from this broad authority to regulate." *Town of Hallie v. City of Eau Claire*, 471 U.S. at 34 (1985).

Omni's reliance upon *Community Communications Company, Inc. v. City of Boulder, Colorado*, 455 U.S. 40 (1982) is misplaced. In *City of Boulder*, Colorado's Home Rule Amendment to the Colorado Constitution granted to some municipalities the power enact law extending to all its local and municipal matters and provided that ordinances enacted pursuant to the home rule amendment "shall supersede within the territorial limits . . . of said city or town any law of the state in conflict therewith." The intent of the Colorado Home Rule Amendment is to grant to the people of such municipalities "the full right of self government in both local and municipal matters." *Id.* Rejecting an argument that the requirement of "clear articulation and affirmative expression" is fulfilled by the Colorado Home Rule Amendments' guarantee of local autonomy" and that Colorado thereby contemplated *Boulder's* enactment of the challenged ordinance regulating the cable industry, the Supreme Court stated that

But plainly the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere neutrality respecting

the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have contemplated' the specified anticompetitive actions for which municipal liability is sought. . . .

*Id.* at 55.

It is not necessary, as Omni contends, for South Carolina to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects. It is sufficient that the statutes authorize the City to regulate land uses and to regulate and restrict the "percentage of lot that may be occupied, size of yards, courts and other spaces, the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes." S.C. Code Ann. § 5-23-10. Anticompetitive effects logically would result from this broad authority to regulate. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), citing *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (no express intent to displace antitrust laws, but statute provided regulatory structure that inherently "displace(d) unfettered business freedom.")

The Court concludes that the above mentioned South Carolina statutes evidence a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation as to land uses, including the numbers, location and size of structures and land for trade, industry or other purposes. And the statutes reveal that "the legislature contemplated the kind of action complained of." *Town of Hallie v. City of Eau Claire*, 471 U.S. at 34 (1985); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). Thus, the clear articulation requirement of the state action test has been met. The City is not required to show that its actions are compelled or actively supervised by the State of South

Carolina. In *Town of Hallie v. City of Eau Claire* the Court observed that

None of our cases involving the application of the state action exemption to a municipality has required that compulsion be shown. Both *City of Boulder*, 455 U.S. at 56-57, 70 L.Ed. 2d 810, 102 S. Ct. 835 and *City of Lafayette*, 435 U.S. at 416-417 55 L.Ed. 2d 364, 98 S.Ct. 1123 spoke in terms of the State's direction or authorization of the anticompetitive practice at issue. This is so because where the actor is a municipality, acting pursuant to a clearly articulated state policy, compulsion is simply unnecessary as an evidentiary matter to prove that the challenged practice constitutes state action. In short, although compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to a clearly articulated state policy. *Id.* at 45, 46.

Upon consideration, the Court concludes that actions of the City of Columbia in this case are exempt from liability under the Sherman Act. The City acted pursuant to a clearly articulated and affirmatively expressed state policy to regulate land uses as to location, nature and sizes of structures thereon, all of which are declared necessary for the "promotion, protection, and improvement of the public health, safety, comfort, good order, appearance, convenience, prosperity, morals and general welfare. . . ." Accordingly, the City of Columbia's motion for judgment notwithstanding the verdict is granted.

### III.

#### MOTION OF COLUMBIA OUTDOOR ADVERTISING, INC. FOR JUDGMENT NOTWITHSTANDING THE VERDICT

COA moves for judgment notwithstanding the verdict under Rule 50. F.R.Civ. P., for a variety of reasons including the ground that the evidence was insufficient to

support the jury's verdict that COA conspired to restrain trade or that it conspired or attempted to monopolize; that "assuming arguendo that the evidence establishes that COA possessed monopoly power in the relevant market, the evidence demonstrates that said monopoly was the result of historic accident" and COA's skill and hard work and not the result of unlawful conduct by COA. To the extent that the verdict rests upon evidence that its officers lobbied the Mayor and City Council and other city officials, COA argues that its conduct is beyond the reach of the Sherman Act under the *Noerr-Pennington Doctrine*. See *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.* 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). As to the verdict against it under Count VIII, alleging it violated the South Carolina Trade Practices Act, S.C. Code Ann. §§ 39-5-20 and 39-5-140, COA argues *inter alia* that the evidence was insufficient to sustain the verdict.

### A.

As noted above, COA has operated its outdoor advertising business in Columbia and surrounding areas for several years and, by the time Omni entered the market in 1981, COA enjoyed a dominant position. The evidence at trial demonstrates that Omni was formed in the fall of 1981. Omni's officials surveyed the Columbia, South Carolina market and determined that, notwithstanding COA's dominant position, local regulations favored Omni's entry into the market. When COA officials learned of Omni's planned entry into the market, they investigated Omni's background of performance in other communities. COA's chairman traveled to other communities and studied and acquired copies of ordinances enacted by other cities that impose restrictions upon outdoor advertising. COA's chairman met with the City's mayor and discussed a proposed ordinance. Representatives of both Omni and COA appeared at meetings of the



City Council during discussion and consideration of proposed ordinances focusing upon the outdoor advertising industry. On March 24, 1982 the City Council passed an ordinance which placed a moratorium on all billboard construction unless council expressly consented to the construction. That ordinance was declared unconstitutional. A new ordinance was passed September 22, 1982 which, Omni contends, favors COA's dominant position in the Columbia market and improperly restricts Omni's ability to compete in that market. Additionally, COA officials apparently donate advertising space to candidates for political office, including members of the Columbia City Council, or sells them space at rates that reflect substantial "political discounts."

#### B.

##### *Noerr-Pennington Doctrine*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, the Supreme Court stated that "No violation of the (Sherman) Act can be predicated upon mere attempts to influence the passage or enforcement of law." Since the Sherman Act only prohibits restraints and monopolization that are created or attempted by individuals or corporations, no violation occurs where a restraint upon trade or monopolization is the result of valid government action. *Id.* The Supreme Court also held that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.* Later in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) the Supreme Court reaffirmed its holding in *Noerr* and announced that *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." The Court stated that

Joint efforts to influence public officials do not violate the antitrust law even though intended to eliminate

competition. Such conduct is not illegal, either standing alone or as part to a broader scheme itself violative of the Act.

*United Mine Workers v. Pennington*, *Id.* at 670.

Thus, it appears that COA's lobbying activities, designed to attempt to persuade the City's Mayor and governing body to take particular action with respect to a law that would produce a restraint or a monopoly are beyond the reach of Sherman Act. It must be remembered that COA had been present in the Columbia market for many years before Omni sought to enter that market. However when Omni arrived in 1981, both COA and Omni met with City officials and they both appeared before Columbia's city council and stated their views concerning the merits of the proposed ordinances. COA's activities beyond its lobbying efforts suggest that it became alarmed and sought to gain information about the formidability of a new competitor entering the market. That COA officials secured copies of sign ordinances adopted by other municipalities and later shared them with the City's governing body as examples of action it desired of the City, underscores its lobbying activities. And its donation of free advertising space to elected municipal officials and others seeking election or reelection is not prohibited by the Sherman Act. Nor is such activity evidence of a conspiracy. Whatever its purpose, COA sought, through these gratuitous acts, to enhance its position in the view of the recipients. And, that COA officials conferred with Omni competitors in other states, financial institutions and others concerning Omni's business practices do not remove the protection of the *Noerr-Pennington* doctrine. In *Ottensmeyer v. Chesapeake & Potomac Telephone Company of Maryland*, 756 F.2d 986 (4th Cir. 1985) the Court held that providing information about a competitor's business to police which resulted in a search of the plaintiff's business premises was pro-

ted by the *Noerr-Pennington* doctrine. See also *Forro Precision v. International Business Corp.*, 673 F.2d 1045 (9th Cir. 1982). In *Czajkowsk v. Illinois*, 460 F. Supp. 1265 (N.D. Ill. 1977, aff'd. 588 F.2d 839 (7th Cir. 1978)) the plaintiff, a cigarette vender, alleged that his competitors had asked state officials to enforce state laws governing the sale of cigarettes in order to force him out of business. The plaintiff alleged that the inducements for such enforcement included campaign contributions to state officials, and further alleged a conspiracy among competitors and those officials. The district court held that the defendants conduct was exempt under the *Noerr-Pennington* doctrine. See also *Metro Cable Company v. CATV Company of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975).

In *Federal Prescription Services, Inc. v. American Pharmaceutical Association*, 663 F.2d 253 (D.C. Cir. 1981) cert. denied 455 U.S. 928 (1982) the court held that a national association of pharmacists were not liable under the antitrust laws for damages arising from its legitimate efforts to secure governmental action against a mail-order pharmacy, whether such efforts were made through financing lawsuits, lobbying legislatures or petitioning administrative bodies. The court stated that

*Noerr* holds the antitrust laws are not intended to regulate genuine efforts to secure governmental action. That (defendants') efforts were genuine is manifested by their success. It would make a nullity of *Noerr* to hold a State board to be coconspirator, and the petitioning activity directed at it thus unprotected on the basis that the petitioning was successful. That a public official is persuaded by the entreaty of a lobbyist does not make him the lobbyist's coconspirator.

*Id.* at 265.

## C.

Omni argues that *Noerr-Pennington* is inapplicable here and that the doctrine does not protect parties who have conspired with a public entity. Omni also argues that COA's conduct is within the sham exception to *Noerr-Pennington* and that therefore the doctrine does not protect COA.

As above stated, the city is exempt from Sherman Act liability in this case under principles announced in *Town of Hallie v. City of Eau Claire*, 471 U.S. 346 (1985). Therefore, COA has not "conspired" with the City within the meaning of the Sherman Act, 15 U.S.C. §§ 1 & 2 unless the so called coconspirator" exception to *Noerr-Pennington* applies to these facts. COA's conduct sought the enactment of city ordinances by a municipality to regulate land uses under clearly articulated and expressly stated state policies. COA could not "conspire" with a municipality that is exempt from liability for its anticompetitive acts.

In support of its claim that *Noerr-Pennington* is inapplicable when, as here, a governmental body is named as co-conspirator Omni cites several cases, including *Duke & Company, Inc. v. Foerster*, 521 F.2d 1277 (3rd Cir. 1975) which held that "where the complaint goes beyond mere allegations of official persuasion by anti-competitive lobbying and claims official participation with private individuals in a scheme to restrain trade, the *Noerr-Pennington* doctrine is inapplicable." However, several courts have criticized this co-conspirator exception. See *Metro Cable Co. v. CATV Company of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975); *Westborough Mall v. City of Cape Girardeau, Mo.*, 693 F.2d 733 (8th Cir. 1982). *Federal Prescription Service, Inc. v. American Pharmaceutical Association*, 663 F.2d 253 (D.C. Cir. 1981). In *Alphin Aircraft, Inc. v. Henson*, [1984-2 TRADE CASES. ¶ 66,161] the court cited with ap-



proval *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982) which rejected *Duke* and applied the *Noerr-Pennington* exemption even when the government is named a coconspirator. The Fourth Circuit also quoted with approval the following statement:

Plaintiff's position is in essence that an agreement to attempt to induce legislative action is 'conspiracy,' and that if some of the 'conspirators' persuade a member of the legislative body to agree to support their cause, he becomes a 'conspirator' and a Sherman Act violation results. Such a rule would in practice abrogate the *Noerr* doctrine. It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body becomes 'coconspirators.'

*Alphin Aircraft, Inc. v. Henson*, [1984-2 TRADE CASES. ¶ 66,161]. The Court found *Metro Cable TV, Inc. v. CATV Company of Rockford, Inc.* and cognate cases "more persuasive" and declined to apply a coconspirator exception to the *Noerr-Pennington* doctrine. *Id.* In this case too the Court declines to apply a coconspirator exception.

Omni argues that COA's conduct places it within the sham exception to *Noerr-Pennington*. Actions taken to discourage and ultimately prevent competitors from meaningful access to the process of administrative agencies fall within the sham exception to *Noerr-Pennington* immunity. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). *Hospital Building Company v. Trustee of Rex Hospital*, 691 F.2d 678 (4th Cir. 1982). In *California Motor Transport Co. v. Trucking Unlimited*, the Court stated that when the proof establishes "a pattern of baseless, repetitive claims . . . which leads the factfinder to conclude that the administrative and judicial processes have been abused, such actions are not entitled to antitrust immunity." 404 U.S. at 511.

In *Alphin Aircraft, Inc. v. Henson*, [1984-2 TRADE CASES. ¶ 66,161] the Court observes that "to invoke the sham exception some abuse of process, although not necessarily access barring, must be alleged" citing *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259 (9th Cir. 1982). In *Alphin* the plaintiff claimed that the defendant used the position of airport manager to control the development and enactment of an anticompetitive master plan and bylaws by the Hagerstown Maryland City Council. The Fourth Circuit found no evidence to support the plaintiff's contention that the case falls within the sham exception; and stated that "it is not at all clear that denial of meaningful access to a legislative body, as opposed to a judicial or an administrative one, would constitute a sham. *Id.* The Court observed that "the sham exception may apply when the government acts solely in a business, or proprietary capacity" but that the doctrine (the sham exception) was inapplicable to *Alphin* since the City of Hagerstown, in enacting the master plan and bylaws, was functioning in its legislative capacity.

In this case too, the City has acted in its legislative capacity in enacting the ordinance of which Omni complains. The evidence does not establish facts which bring this case within the sham exception to the *Noerr-Pennington* doctrine.

Upon consideration of the arguments, the motion of COA for judgment notwithstanding the verdict is granted.

### III.

#### The South Carolina Unfair Trade Practice Act

The jury returned a verdict for Omni against COA on Omni's claim (Complaint, Count VIII) that COA violated the South Carolina Unfair Trade Practice Act, S.C. Code Ann. § 39-5-10 *et seq.* COA now seeks judgment notwithstanding the verdict under Rule 50, F.R.

Civ.P. upon several grounds, (1) that evidence was insufficient to support a finding that COA violated the Act; (2) that the evidence was insufficient to support a finding that COA's conduct was substantially injurious to Omni; and (3) that the South Carolina Unfair Trade Practice Act is unconstitutionally vague.

After the trial of this case the South Carolina Court of Appeals held that in order to state a claim under the Unfair Trade Practice Act a plaintiff must allege an injury which has an impact upon the public interest. *Noack Enterprises Inc. etc. v. Country Corners Interiors of Hilton Head Island Inc, et al*, 351 S.E. 2d 347 (S.C. App. 1986); *cert. denied* Opinion No. 22812 (S.C. Filed December 7, 1987). The Court stated that

To be actionable under the UTPA, therefore, the unfair or deceptive act or practice in the conduct of trade or commerce must have an impact upon the public interest. The Act is not available to redress a private wrong when the public interest is unaffected.

*Id.* at 350.

In this case the evidence does not establish COA's conduct impacted the public interest. While the ordinance enacted by the City is an exercise of the police power and affects the public interest, any anticompetitive effect to Omni flows from the ordinance. Omni's complaint against COA is a private one which the South Carolina court has held that the Act is not available to redress.

COA's motion for judgment notwithstanding the verdict is granted.

#### IV.

In summary, for the reasons above stated, the following rulings are made on pending motions in this case.

1. The City of Columbia's motion for judgment notwithstanding the verdict is granted.

2. Columbia Outdoor Advertising, Inc.'s motion for judgment notwithstanding the verdict is granted.

3. Omni Outdoor Advertising, Inc.'s motions for injunctive relief, attorneys fees and for a bond are denied.

IT IS SO ORDERED.

/s/ Matthew J. Perry  
MATTHEW J. PERRY  
United States District Judge

Columbia, South Carolina, November 17, 1988.



## APPENDIX C

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. 88-1388

OMNI OUTDOOR ADVERTISING, INC.,  
*Plaintiff-Appellant*  
v.COLUMBIA OUTDOOR ADVERTISING, INC.;  
J. WILLIS CANTEY;  
THE CITY OF COLUMBIA,  
*Defendants-Appellees*On Petition for Rehearing with Suggestion for  
Rehearing In Banc

[Filed Feb. 15, 1990]

The appellees' petition for rehearing and suggestion for rehearing en banc were submitted to this Court.

On the question of rehearing before the panel, Judge Wilkins voted to rehear the case. Judges Sprouse and Haden voted to deny.

In a requested poll of the Court on the suggestion for rehearing en banc, Judges Russell and Chapman were disqualified from voting; Judges Widener, Hall, Wilkin-son and Wilkins voted to rehear the case en banc; and

Judge Ervin, Phillips, Murnaghan and Sprouse voted against en banc rehearing.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges did not vote to rehear the case en banc,

IT IS ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse.

For the Court,  
/s/ John M. Greacen  
Clerk

## APPENDIX D

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, provide as follows:

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty

thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.



In The  
**Supreme Court of the United States**

October Term, 1989

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CITY OF COLUMBIA  
and COLUMBIA OUTDOOR ADVERTISING, INC.,

*Petitioners,*

vs.

OMNI OUTDOOR ADVERTISING, INC.,

*Respondents.*

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On Petition For A Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION  
TO CERTIORARI

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A. CAMDEN LEWIS  
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**RESTATED QUESTIONS PRESENTED**

I. Whether the conclusion of the Court of Appeals that sufficient evidence existed to implicate the City of Columbia in an antitrust conspiracy with Columbia Outdoor Advertising warrants further review by this Court?

II. Whether the conclusion of the Court of Appeals that sufficient evidence existed to support the jury verdict that COA's actions were within the "sham" exception to *Noerr-Pennington* warrants further review by this Court?



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## STATEMENT OF THE CASE

As presented by Petitioners, this case involves nothing more than "successful lobbying" by a monopolist to prevent a potential competitor from entering its market. This is emphatically not so.<sup>1</sup> During a one month trial the Respondent undertook to prove the existence of a corrupt, anticompetitive conspiracy between the mayor and other officials of the City of Columbia (City) and Columbia Outdoor Advertising, Inc. (COA). The jury expressly found that this corrupt conspiracy existed.

As is discussed more fully below, the evidence showed that COA had given the Mayor and members of City Council free or reduced rate billboard space. It had given politicians preferred billboard locations. COA's president, Mr. Cantey, admitted that it gave benefits to politicians with the clear understanding that favors would be provided in return. A reasonable implication of this testimony was that free billboards and preferred locations would be available to the Mayor and Council members only if the favors COA requested were provided. As a monopolist COA bargained from a position of strength.

COA had successfully maintained monopoly status in Columbia for some years. COA's facilities in Columbia were dilapidated. The trial established that COA "snitched" billboards. As used in this context, "snitching"<sup>2</sup> is the practice of selling billboard space to a

<sup>1</sup> The Petitioner's Questions Presented are drawn so as to appear to answer themselves. Unfortunately for Petitioner they have nothing to do with this fact-intensive case; Respondent has therefore restated questions presented in a more realistic form.

<sup>2</sup> The word "snitching" came from COA's own records, found in discovery.

national advertiser and then papering over his advertisement with a local advertiser's message. This allows double billing for the same space or allows for a well-placed political advertisement.

In spite of these defects, because COA had no significant competition, it still maintained a 95 percent share in the Columbia market.

The evidence established that before OMNI showed interest in the Columbia market, another billboard company had planned to enter the Columbia market. In a letter written to that company, COA's President, Mr. Cantey, boasted of his longstanding relationship with the mayor and City Council. He indicated that his son was drafting an ordinance restricting new billboards in the city. He stated that the ordinance would be passed if he requested it. The other company abandoned its plans to build a plant in Columbia.

The facts showed that City officials had agreed, even before OMNI's appearance, to give Mr. Cantey whatever he wanted, whenever he wanted it. At his request, they deliberately tailored restrictions to favor Mr. Cantey's interests and repeatedly expanded and narrowed billboard control at Mr. Cantey's request.

In fact, at the outset of Mr. Cantey's campaign against OMNI he called upon City Council to adopt an immediate and patently illegal moratorium against new billboard construction. The moratorium applied even where OMNI already had permits to build signs. It was adopted over the City Attorney's objection that it was unconstitutional under directly applicable South Carolina Supreme Court precedent. The South Carolina courts struck down the moratorium.

These facts are discussed in more detail below. They clearly support an inference that even the passage of the restrictive ordinances that forced OMNI out of the Columbia market were due to something far more sinister than "successful lobbying" by COA, as Petitioner suggests. As stated above, OMNI undertook to prove a corrupt conspiracy between the City and COA. The jury expressly found that such a conspiracy existed.

"Do you find that the Defendants, Columbia Outdoor Advertising, Inc., and the City of Columbia conspired in restraint of trade against the Plaintiff, OMNI Outdoor Advertising, Inc. Answer: Yes." (Tr. 2502).

"Do you find that the Defendants, Columbia Outdoor Advertising, Inc., and the City of Columbia conspired against the Plaintiff, OMNI Outdoor Advertising, Inc. to monopolize the outdoor advertising market in Richland and Lexington Counties? Answer: Yes." (Tr. 2502).

Instead of the case painted by Petitioners, the real case involves an unusual, if not indeed unique, set of facts. The officials who ran the government of the City and the officers owning and running the private, closely-held COA had a secret, illegal and continuous agreement to utilize mutual resources, including perverted governmental powers, to benefit each other both financially and politically by excluding COA's competitors and by providing unfair advertising advantages to incumbent Councilmen making them more difficult to defeat. The case is literally not like any other case cited by Petitioners; *Parker v. Brown*, 317 U.S. 341 (1943) does not apply. In *Parker* this Court specifically noted that its holding did not provide antitrust immunity when there was a "question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of



trade." (*Id.* at 351-352).<sup>3</sup> The jury here found the City to have been such a participant. Respondent OMNI believes that ought to end the matter. However, the discussion below will demonstrate how the record clearly supports the jury verdict.<sup>4</sup>

From the very start of this action it was well recognized and held by the lower court that the acts of passing various ordinances constitute but overt acts of the conspiracy.<sup>5</sup>

<sup>3</sup> Petitioners nowhere refer to this aspect of the *Parker* decision.

<sup>4</sup> OMNI will cite to the record below; in keeping with the tenor of Rule 19.1, OMNI has not sought certification of the record, which occupies 12 volumes and runs to a total of 3,811 pages.

<sup>5</sup> Judge Lloyd F. MacMahon recognized this in this very case by his orders of July 13, 1983, and September 7, 1983, denying the Defendants' motion to dismiss. As he wrote in his Order of July 13, 1983 (*OMNI Outdoor Advertising v. Columbia Outdoor Advertising, Inc.*, 566 F.Supp 1444, 1446 (D.S.C. 1983)):

"Fortunately, we are not required to answer the nice question whether the cited sections of the South Carolina Code satisfy the *Boulder* requirements. The complaint in this case simply does not allege that the three ordinances passed by the City Council violated the antitrust laws; rather, it alleges that defendants conspired to violate Sherman Act §§1 and 2 and that the ordinances were three of the many overt acts committed in furtherance of the conspiracy. In other words, the evil plaintiff complains of is not the ordinances standing alone but rather the conspiracy. It is within the realm of possibility that evidence upon a trial might show corruption or bad faith anticompetitive actions on the part of city officials, *see generally* P. Areeda, *Antitrust Law* §203.3c (Supp. 1982)." (Tr. 44).

The facts of the conspiracy in this case center upon a standing agreement between the City and COA to the effect that the City was to do everything in its power to insure and protect COA's monopoly position in the area. This prior agreement was implemented, *inter alia*, (1) by the Defendants' devising a plan and agreeing to stop OMNI through the use of unquestionably illegal moratoriums; (2) by shutting OMNI out of the decision-making process; (3) by giving COA advance warning of the imminent passage of COA-drafted ordinances; and (4) by thereafter imposing spacing and location requirements through new ordinances which permitted the existing COA plant to remain intact while forbidding OMNI from placing its boards competitively. At the same time COA was given the opportunity by the City to "sneak in" new locations. This was graphically illustrated by Plaintiff's demonstrative Exhibits Nos. 55 and 57, (Tr. 2756 and 2759). Because there was no competition at key locations during this same time period, COA was selling the key locations twice, "double billing" (Tr. 921). In order to further stop OMNI, COA offered artificially low rates (Tr. 1091, 2755). The result of this "freezing out" of OMNI was OMNI's inability to obtain sign locations and to sell space competitively, which in turn damaged OMNI.

In 1980 another billboard operator, Naegele, thought about coming into Columbia because of COA's very dilapidated and outdated plant. (Tr. 3602-3605). In response to the Naegele threat in 1980 COA got an agreement with the City to pass a restrictive billboard ordinance at any time. Mr. Cantey wrote in a letter:

"The Mayor of Columbia and the four Councilmen are very good friends of ours. I discussed your suggestion with the Mayor about rewriting our existing sign ordinance and he promptly

said, 'no problem.' My son Jim has begun a study to determine exactly what restrictive measures we should request." (Tr. 2704) (*See also* 548-549).

When confronted with this letter Mr. Cantey, the main owner of COA, said:

"You know why I did that? To keep Mr. Naegele out. He was buying everything, Greenville, Spartanburg, Gastonia, Greensboro, Asheville, right all over me. Dooner wasn't even in it." (Tr. 549).

This shows that two years prior to OMNI's involvement in Columbia, COA and the City had a clear understanding that restrictive measures would be put into effect as soon as COA needed them to protect its position in the market.<sup>6</sup>

In 1982 when OMNI decided to enter the Columbia market, COA was in a secure, monopoly position in the outdoor advertising market. (Tr. 222, 301, 1511). Coupled with the agreement with the City, COA owned 95 percent of the outdoor advertising signs in the Columbia market. (Tr. 702).

Once the officers of COA got wind of OMNI's plan they began their campaign to stop OMNI. Efforts to determine how best to force OMNI out of the Columbia market were far-reaching. Mr. Cantey made trips to Baton Rouge, La. and Pensacola, Fla. to investigate how to sabotage and stop OMNI. (Tr. 551, 2710). After discussing COA's situation with his outdoor advertising friends, Mr. Cantey wrote that the way to stop Mr. Dooner and OMNI was to get a city moratorium on signs and then get a city

<sup>6</sup> See Fourth Circuit Opinion, Pet. App. 13a.

ordinance controlling the locations of signs. Some of Mr. Cantey's memos show:

*Memo dated 12/11/81 - visit with Gerry Marchand "Put in spacing 500' now." "Consider moratorium." (Tr. 2722).*

*Memo regarding visit with Naegele in Spartanburg "Put in sign ordinance as soon as possible. 1,000." (Tr. 2698).*

It is obvious that as part of the plan COA called upon its agreement with the City in order to get a restrictive moratorium and an ordinance. This would damage OMNI but not COA. (Tr. 1088). Mr. Cantey called on his political friends as he had in the past. He visited his good friend the Mayor of Columbia at his office in order to discuss sign ordinances and OMNI. (Tr. 2081). Mr. Cantey had given the Mayor six free billboards in his first race. (Tr. 2056-2057). The meeting was followed by a dinner with the Mayor in February, 1982, where COA's problem was again discussed. (Tr. 2695).<sup>7</sup>

The behavior of the Mayor subsequent to these meetings shows his efforts to protect COA. At one City Council meeting OMNI officials were singled out and unfairly attacked by the Mayor in open session. (Tr. 224). On March 24, 1982, City Council and the Mayor passed a moratorium on billboards, banning the construction of billboards within the city limits without Council's express consent. (Tr. 3616). They were informed by City Attorney, Roy Bates, that these actions were unconstitutional and illegal. (Tr. 389-390, 409). The Council passed the moratorium anyway and predictably the State court held that their actions were unconstitutional. (Tr. 2658-2663). Mr.

<sup>7</sup> See Fourth Circuit Opinion, App. Pet. 14a.



Cantey admitted the ordinances were of benefit to COA. (Tr. 1173).<sup>8</sup>

Even before the first moratorium was declared illegal City Council gave first reading to a second moratorium. (Tr. 299, 2649). This had the effect of keeping OMNI's business at a standstill. (Tr. 1255). The Mayor's direct involvement in this second moratorium is evidenced in a City of Columbia Inter Office Memo. (Tr. 3204). Even after the declaration of unconstitutionality, the City dragged its feet about permitting OMNI to construct signs for which it had already leased sites. (Tr. 390-391).<sup>9</sup>

As agreed to by the City and COA, the final restrictive ordinance, passed on September 22, 1982, clearly protected COA's dominant position.<sup>10</sup> (Tr. 338-339). Prior to passage of this ordinance, OMNI tried to give input into the process but was consistently thwarted. (Tr. 393-394, 830-835).

A comparison of the notes made by city officials after meetings shows that the demands of COA made up the ordinance. COA demanded that the distance between signs in M-1 and M-2 zones be increased from 750 feet to 1,000 feet, which was accordingly done. (Tr. 3785). OMNI objected to having any distance requirement on the opposite side of the streets. COA indicated it had no problem with such a requirement and Council passed it. (Tr. 2198-2199). The September 22, 1982, ordinance is unreasonably and unusually strict and it is tailored to insure that OMNI could not get necessary sign locations in the

<sup>8</sup> See *Id.* at 14a-15a.

<sup>9</sup> See *Id.* at 15a.

<sup>10</sup> See *Id.* at 16a.

critical Columbia core area. (Tr. 835-847). Another memo from the City Manager to City Council illustrates the unfair bias in favor of COA and the nonaccess to the process of OMNI. (Tr. 3804-3805).

A closer look at the time period between March, 1982, and October, 1982, clearly shows the conspiracy and the overt acts in furtherance of the conspiracy. A draft of a moratorium was written by Councilman Patton Adams on the back of an agenda – not the usual way of writing ordinances – the morning of March 10, 1982, the day of the first reading of the moratorium. (Tr. 1901). That day, first reading was given to the following moratorium:

Upon motion by Mr. Adams, seconded by Mr. Barnes, Council voted unanimously that no billboards will be constructed in the area bounded by Harden Street, the River, Heyward Street and Elmwood Avenue or in any area where a rezoning has been or shall be proposed, including the Rosewood Corridor area, without the express prior permission of City Council. (Tr. 3190).<sup>11</sup>

A really telltale event is that on the 9th of March, COA ran out and got from the City three new sign locations of which two were in the moratorium area. (Tr. 3187).<sup>12</sup> On March 24, 1982, a reworded, more restrictive moratorium was passed. (Tr. 3616).

This moratorium was much more restrictive than the one given first reading on March 10, 1982, and was intended to be. No one took credit for these changes that obviously further protected COA. (Tr. 2190). Again COA knew of the upcoming moratorium change, while OMNI

<sup>11</sup> It is important to note that this draft of the moratorium did not cover all locations in Columbia.

<sup>12</sup> See Fourth Circuit Opinion, App. Pet. 14a.



did not. Between March 9, 1982, and March 24, 1982, COA obtained from the City ten new locations in the area to be affected by the new moratorium of March 24, 1982. (Tr. 3187). These were more locations than COA had obtained in all of 1982. (Tr. 3187).<sup>13</sup>

Other events happened during this period that show the implementation of the agreement between the City and COA to protect COA. There is the letter of February 10, 1982, where Mr. Cantey threatens Mr. Dooner:

"At some point I think City Council will be forced to place some type of stringent restrictions on our industry." (Tr. 2695).

At the airport in Atlanta Mr. Cantey told Mr. Dooner that he was going to get "1,000 feet spacing." (Tr. 664).<sup>14</sup> He did just that.<sup>15</sup>

A review of Exhibit 21 (Tr. 3785) shows that City planners have suggested 750 feet spacing in the critical areas and same side spacing. In the final ordinance Mr. Cantey got his 1,000 feet spacing and opposite side spacing of 500 feet. (Tr. 3785). COA was protected.

The day before the final moratorium, Mr. Cantey had an appointment to see the Mayor. (Tr. 3168-3169). The next day, March 24, 1982, the original moratorium was

<sup>13</sup> See *Id.* at 14a.

<sup>14</sup> Spacing is the key to being able to compete in the Columbia market core (downtown locations). City Exhibit 19 (Tr. 3780) shows the small area that was open to billboards. Of course these were the main arteries to Columbia. OMNI's Exhibit 55 (Tr. 2757) shows the effect of spacing; Columbia was shut down to new billboards. Mr. Cantey knew 1,000 feet spacing would kill OMNI.

<sup>15</sup> See Fourth Circuit Opinion, App. Pet. 16a.

mysteriously changed so as to be even more restrictive.<sup>16</sup> (Tr. 3190). The City then went into a fast track program to pass a restrictive permanent ordinance. (Tr. 1917, 2027).

Mr. Cantey, in a meeting concerning the restrictive permanent ordinance, got mad and stormed out saying he would get Council to give him 1,000 feet spacing. (Tr. 354). He did, too. The 1,000 feet spacing closed down the Columbia core area. (Tr. 872).

Consistency has always been a criterion by which to judge one's actions. Look at the City's actions during the moratorium period. Councilman Adams said billboards were despicable. (Tr. 1914). The rest of Council said they were against billboards. Yet right in the middle of all this supposed concern and hatred for billboards, on June 16, 1982, upon motion by Mr. Adams, the City granted COA a zoning ordinance change in order for COA to be allowed to build one of those billboards the City so despised. (Tr. 380, 384, 387, 1221, 1914). Again, even at this late date, we see an overt act in furtherance of the agreement to protect COA.<sup>17</sup>

Why was the City so willing to enter into the conspiracy to protect COA? The record is replete with COA using the power of its billboard monopoly to favor one politician, particularly an incumbent one, over another. They would give political discounts, (Tr. 2762-2782, 2821) free advertising, (Tr. 1514, 1520) and advantageously located space. (Tr. 1689-1690).<sup>18</sup> It only takes common sense

<sup>16</sup> See *Id.* at 14a-15a.

<sup>17</sup> COA was even given the right to build one of those hated uni-pole signs in a historical zone. (Tr. 1544).

<sup>18</sup> COA even pasted over other ads which had been paid for so they could display advantageously located ads for its favorite politicians. (Tr. 1690).

to understand the importance of well-placed billboards in local elections. The local politician naturally wants to target his specific area of the city or county. How does he do that? He does that by getting a properly located billboard. (Tr. 1690). None of the other kinds of media allow for that: not radio, not television, not newspaper, not magazines, nothing else. Billboards are unique.

In return for discounted billboards, free billboards, and strategically placed billboards, COA expected to be and was paid back by the politicians.<sup>19</sup>

Mr. Cantey said when asked about charging one politician one rate and another a different rate:

Q. That's not fair, charging one nothing and other ones more than your rate card; is it?

By Mr. McDonald:

Objection as leading.

A. I don't know. Maybe he did him a favor.

Q. Maybe he did him a favor?

A. Maybe he did him a favor so he compensated by giving him a free board. I don't know if that happened. (Tr. 1206).

In discussing discounted space to politicians, Mr. Cantey Heath said:

Q. You would expect her to do the favors you would want Lieutenant Governor Mike Daniel to do for you, too, wouldn't you?

A. I would expect her to help me if I asked for it. (Tr. 1627).

The Mayor and the Councilman agreed to help COA keep out OMNI. It was the payback COA expected for their efforts in the Mayor's and Councilmen's elections.

<sup>19</sup> See Fourth Circuit Opinion, App. Pet. 16a-17a.

Finally the story brings us to "double billing." (Tr. 921). Nothing could be more wrong. Mr. Cantey of COA said it was stealing. (Tr. 1179).

The record clearly shows a pattern and practice by COA to sell a prime billboard location to a national customer as part of his overall billboard package and then sell the same locations for the same time to a local customer or politician, covering up the national customer's sign with a local customer's or politician's sign. (Tr. 921-923). COA then would bill the national customer and the local customer for the same time and advertising space. This in effect turns a prime location into two locations (Tr. 921-923). By this practice not only was OMNI not able to match COA's distribution of locations, COA was taking OMNI customers by telling lies about which locations were available and then stealing a national customer's location and giving it to a local customer or politician. COA injured OMNI by its monopoly-empowered acts. To keep their cozy relationship of stolen profits and advantages of free (or low-cost) space, COA and the City politicians went to great lengths. They certainly, as the jury has found, would and did conspire and convert the City process into a sham.

### SUMMARY OF ARGUMENTS

Viewing the evidence with appropriate deference to the jury verdict, the Court of Appeals performed a straightforward analysis of the factual record in the case at bar. The Court of Appeals came to the conclusion that "when viewed in the light most favorable to OMNI, the evidence tends to 'exclude the possibility' that the City and COA acted independently." The Court of Appeals went on to say the evidence supports the "City and COA



'had a conscious commitment to a common scheme' designed to stifle competition and preserve COA's monopoly." (Pet. App. 17a-18a).

The Court of Appeals also performed a thorough analysis of the conspiracy exception to *Parker* immunity coming to the clear conclusion that there is no blanket protection for all "conspiracies which have some political coloration." (Pet. App. 12a). The Court went on to point out that the proven conspiracy in the case at bar is not protected. There is no appeals court case that holds *all* antitrust conspiracies involving municipalities are immune under *Parker*.

The final attack by Petitioner centers on the recognized "sham" exception to the *Noerr-Pennington* Doctrine. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931 (1988). The record, as the Court of Appeals recognized, supports a jury finding that COA's actions came within the "sham" exception. (Pet. App. 22a-23a). The evidence supports the conclusion that COA's interactions with the Mayor, members of City Council, and city officials was "nothing more than an attempt to interfere directly with business relations of a competitor." (Pet. App. 22a). Likewise, COA's actions show its purpose was to delay OMNI's entry into the market and deny OMNI meaningful access to the City's administrative and legislative fora. The evidence also shows that COA, through the City, instigated the enactment of an ordinance which was patently unconstitutional and known to be so and proceeded with frivolous litigation on the ordinance until new, COA-crafted restrictive measures could be enacted. The evidence clearly supports the conclusion that such proved actions by COA

were not genuinely aimed at procuring favorable government action but were a mere "sham" with its purpose to delay, stop and damage OMNI.

The jury has viewed the facts upon instructions as to *Parker* and *Noerr-Pennington* and found for the Respondent. The Court of Appeals has found evidentiary support for that verdict.

### REASONS FOR DENYING THE WRIT

As Respondent's Statement of the Case and Restatement of the Questions Presented illustrate, the introductory paragraphs of Petitioner's purported Reasons for Granting the Writ are designed to lead this Court to misapprehend the question present in this case.<sup>20</sup>

Respectfully, this Honorable Court does not sit to reverse jury decisions on the facts. Further, the discussion below will demonstrate that this case is one of very limited applicability, and that there is no conflict among the decisions of the Circuits below.

1. There is in fact no inconsistency between this decision of the Fourth Circuit on the one hand and the Ninth and Third Circuits on the other, as maintained by

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<sup>20</sup> Respondent OMNI should point out that it has taken the position that zoning laws do not constitute the kind of *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) authorization to engage in anticompetitive activity that they were found to be by the Fourth Circuit. "Lobbying" of an entity which could not legally do what was being requested through the lobbying would obviously not be protected activity under any reading of the law. Thus, such "lobbying," even if it were restricted to wholly aboveboard, legitimate activity, would give rise to liability since there would just be no *Parker* issue involved.



Petitioners in their first ground. The Ninth Circuit's position on *Parker* immunity is principally stated in the *Llewellyn* decision<sup>21</sup> cited in the Petition.<sup>22</sup>

*Llewellyn* was decided on summary judgment so far as the antitrust aspect of the case was concerned.<sup>23</sup> The precise *Parker* question was articulated by the Ninth Circuit, per Judge Kennedy:

The adoption of the de facto fee schedule presents some different questions, namely whether action within the intendment of section 656.248 and entitled to *Parker* immunity loses such immunity because taken in a procedurally improper manner. We hold that such action may retain its immune character, and that it does so in this case. (765 F.2d 769, 773) (emphasis supplied).

The "procedurally improper manner" issue involved an adoption of a rate schedule having been found improper because it bypassed required rulemaking procedures of the state APA. (*Id.* at 772). The Court went on to point out that principles of federalism would militate against subjecting a state to liability from which it would otherwise be immune simply because it imperfectly exercised its

<sup>21</sup> *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985) (Kennedy, J.).

<sup>22</sup> Petitioners also cite to *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886 (9th Cir. 1988). The claim there was dismissed pursuant to motion, the Court depending entirely upon *Llewellyn*: "[t]his claim is also controlled by *Llewellyn*." (841 F.2d at 892.) Thus, the meaningful discussion is of *Llewellyn*.

<sup>23</sup> At the risk of seeming repetitive, OMNI wishes to stress that the instant case went through a month of trial and resulted in a jury decision. This distinguishes it from every single case relied upon by the Petitioners.

power under its own law. (*Id.* at 774). The reason behind this assertion, in turn, was straightforward: it is obvious that no state "authorizes" errors of fact, law, or judgment; if the Federal system were to be able to find liability because of an "unauthorized" act every time there had been a "mistake" by some state entity, both the lure of the treble damages remedy and sheer contrariness could propel many cases into the Federal court system, to the enormous detriment of "Our Federalism."

Nothing in the *Llewellyn* opinion so far as it addresses *Parker* even suggests that there is no conspiracy exception to *Parker* immunity. Instead, the *Llewellyn* opinion moves directly from *Parker* to *Noerr-Pennington*, implying directly that in fact *Parker* did not protect the Defendants:

Appellants allege that SAIF violated anti-trust laws in lobbying the OWCD to take the governmental actions here in question. SAIF and its actions in this regard may have been outside the scope of *Parker* immunity, but this aspect of the complaint fails nevertheless under the *Noerr-Pennington* doctrine.<sup>24</sup> (765 F.2d at 775) (emphasis supplied).

Finally, directly with regard to the conspiracy issue, the *Llewellyn* case in fact supports the position of the Fourth Circuit, since it specifically went off on the vague and conclusory nature of the provisions of the Complaint rather than the factual situation. See *Llewellyn*, 765 F.2d 769, 775.

In the case at bar there are no vague "allegations"; this is a proved and specifically found conspiracy. There is no worry about "vagueness" or lack of support, and

<sup>24</sup> *Noerr-Pennington* is discussed *infra*.

bad faith was in fact proved. The *Llewellyn* case accepted<sup>25</sup> conspiracy as an exception to both *Parker* and *Noerr-Pennington*.

The Third Circuit's approach in *Hancock Industries v. Schaeffer*, 811 F.2d 225 (3d Cir. 1987) is even less on point. This is not the case at bar; there is no allegation in *Hancock* of conspiracy, nor any determination regarding conspiracy. There is some discussion of "ulterior" motives on the part of some governmental decision makers, but those "ulterior" motives all have to do with the governmental authority acting to benefit itself financially (not with individuals acting to benefit themselves illegally) while articulating a different reason:

... the haulers suggest that the challenged exclusionary policy was adopted so that the Chester Authority would be in a position to negotiate a better contract with the City or, as the haulers put it, to extort an unconscionable price from the City. (811 F.2d at 234).

<sup>25</sup> As does Professor Areeda. See P. Areeda & H. Hovenkamp, *Antitrust Law*, §§ 203.3a, 203.3c (Supp. 1987):

'Conspiracy' is not necessarily inapt where the member(s) of an official agency

- (1) Accepts a bribe;
- (2) Decides out of personal bias and for no other reason;
- (3) Decides in favor of a personal financial interest in privity with or perhaps even closely allied to that of one or more of the plaintiff's rivals, whether on the board or not. (p. 33).

As OMNI pointed out in the proceedings before the Fourth Circuit, COA's activities with the City fit at least (2) and (3) of the above, and possibly (1), depending on one's definition thereof.

This is not the kind of situation involved here. Indeed, the *Hancock Industries* Court goes on later to exclude our kind of situation from its consideration, in its discussion of the reason the *Hallie* decision minimized the need for active state supervision of governmental activity, that being the assertion in *Hallie* that "there is little or no danger that [a municipality] is involved in a *private* price-fixing arrangement." (811 F.2d at 235, quoting *Hallie*) (emphasis in original). In the present situation, there is an existing jury-determined municipal conspiracy with private activity. The "minimal danger" came to pass, and the Fourth Circuit properly found it to be a source of liability.

The issue of "subjective motivations" which the Petitioners attempt to raise simply does not exist in the context of this case.<sup>26</sup> There is no split among the Circuits, and no disagreement from academic analysts, as the foregoing discussion illustrates, regarding whether a proved conspiracy (with objectively proved corrupt purpose) is or ought to be immunized by *Parker*: such a situation is not, and should not be, immunized.<sup>27</sup>

<sup>26</sup> OMNI understands the proposition that such officials' inner thought processes should not be the trigger for antitrust liability. This case does not raise the question.

<sup>27</sup> Cf., *Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810 (11th Cir. 1990), cert. den. sub nom. *Halifax Hosp. Medical Center v. Bolt*, \_\_\_ U.S. \_\_\_, 58 U.S.L.W. 3694, 1990 U.S. Lexis 2287 (April 30, 1990), in which the Eleventh Circuit followed a line of its and the Fifth Circuit's cases in holding that state law did not contemplate the Medical Center's entry into a conspiracy in restraint of trade, so that a directed verdict in favor of the Defendant Medical Center on Plaintiff's conspiracy claim was erroneous. *Certiorari* had not yet been denied in this case when Petitioners' Petition was filed, and they cite it at p. 10 of the

(Continued on following page)



2. The *Noerr-Pennington* issue has also been mischaracterized by Petitioners. They again persist in ignoring the jury's findings of actual conspiracy, and want this Honorable Court to view the private parties as innocent lobbyists and the City as a "legitimately" persuaded governmental entity. They ignore the clear fact that long before this situation arose the City and COA had entered into a secret agreement outside of any legislative process to the effect that at any time COA needed it, the City would immediately use its power to stop competition against COA. They ignore the jury's determination, of course, because to accept it is to recast their second question into the form presented by the actual verdict in the case: whether conspirators with proved corrupt purpose (both for the private parties and for the public parties) should be held liable for corrupting governmental processes and using governmental power and their own monopoly power for their own anticompetitive and monopolistic ends while excluding Plaintiffs from access to that same governmental power and the same market.

COA was not engaging in petitioning – they were simply implementing the terms of the long-standing conspiracy with the City. When members of the governmental entity, for reasons of their own personal gain – both financial and political – not related to the public

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(Continued from previous page)

Petition for the proposition that the Eleventh Circuit had applied the conspiracy exception. The citation is accurate so far as it goes, although it does not highlight the somewhat different modes of analysis used by the Eleventh and Fourth Circuits to arrive at the same end; more to the point, Petitioners fail to note, again, that *Parker* itself is the source of law involved.

welfare, join with private parties to restrain trade and monopolize, the First Amendment offers them no shelter. The cases cited by the Petitioner as being putatively contrary to the Fourth Circuit's approach in this case in fact say nothing to the contrary.

The principal case upon which Petitioners rely is *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975). In that case the Court was careful to exclude the exact situation found by the jury to exist in the case at bar. The essence of that case, as the Court saw it, was that certain persons persuaded a member or members of a legislative body to support their cause. (516 F.2d at 230). The Court specifically distinguished, *inter alia*, a case in which an official of the FDA was alleged to be a co-conspirator and potential liability was upheld (*Israel v. Baxter Laboratories, Inc.*, 151 U.S.App.D.C. 101, 466 F.2d 272 (1972)), precisely because it involved the very situation found here:

... the court viewed the complaint as alleging that the real purpose of defendants was 'to preclude, not induce, fair FDA consideration of the safety and efficacy of plaintiff's drug' (*id.* at 279), thus bringing the case within the sham exception. (516 F.2d at 230).

In the case at bar, the real purpose of the defendants was to block fair consideration by the City Council of the merits of any entity's position and to maintain COA's position in the market. They succeeded and grievously injured Plaintiff in its attempted entry. The District Judge instructed the jury, as the Fourth Circuit pointed out (Pet. App., p. 23a), that Defendants would not be protected "[i]f you find Defendants conspired together with the intent to foreclose the Plaintiff from meaningful access to a legitimate decision making process with regard to the



ordinances in question." Nothing in *Metro Cable* is to the contrary.

Petitioners in their footnotes 14 and 15 (Pet., p. 15) cite a number of cases they claim to be contrary to the Fourth Circuit's position in the case at bar. It is not so, as brief case-by-case discussion will illustrate. The cases are considered in the order the cases are raised by Petitioners.

In *Opdyke Inv. Co. v. City of Detroit*, 883 F.2d 1265, 1272-73 (6th Cir. 1989) the Court of Appeals decided that it was reasonable to apply the Local Government Antitrust Act of 1984 (15 U.S.C.A. at §§ 34 - 36) to litigation begun in 1978 under all the circumstances of the case.<sup>28</sup> In a section that appears to be *dictum* in light of the rest of the court's opinion, the Court of Appeals further affirms the district court's decision that the city's prosecution of a single lawsuit in State court which impeded the financing of a proposed alternative stadium for the Red Wings did not give rise to antitrust liability. The city lost the lawsuit, but its position was not frivolous.<sup>29</sup> The Court of Appeals simply ruled that there was no "sham" involved.

*Central Telecommunications v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. den.*, 480 U.S. 910 (1987)<sup>30</sup> substantially supports OMNI's direct position. The Court there wrote, in rejecting Defendants' position

<sup>28</sup> The case had to do with the possible move of the Detroit Red Wings professional hockey team out of the City of Detroit to a site in Pontiac, Michigan.

<sup>29</sup> It is difficult to see how the act of the City of Columbia knowingly imposing an illegal moratorium could not be considered anything other than frivolous. *See supra*, p. 8.

<sup>30</sup> The case had to do with a city council's award of a cable television franchise.

that liability should have been excused due to *Noerr-Pennington*, that

... the jury could properly have found, based on the facts and the court's instructions, that TCI's activities, more than being simply anti-competitive, were not genuine lobbying activities at all but instead were heavy-handed attempts to directly interfere with the business relationships of a competitor, to disturb the political process and to coerce the City into extending TCI's monopoly position, even though Central offered a superior cable system at lower cost. Much of TCI's 'lobbying' made no attempt to provide the City with information on which to base a reasonable choice but, instead, sought to subvert the franchising process. (800 F.2d at 722, n.11) (emphasis supplied).

The principle is the same as the one involved here: entities which *subvert* normal political processes, as Professor Areeda puts it, by accepting a bribe, deciding out of personal bias and for no other reason, or deciding in favor of a personal financial interest,<sup>31</sup> are not entitled to the protection given persons who invoke our political processes, even if those processes are invoked - properly - for base motives.

In *Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n.*, 663 F.2d 253 (D.C. Cir. 1981), *cert. den.*, 455 U.S. 928 (1982), the D.C. Circuit simply found that there was no conspiracy when there was nothing other than formal associational ties involved (state pharmacy boards in many instances were made up of persons who were also members of their state pharmaceutical associations, private bodies; the underlying issue was Plaintiff Federal's desire to distribute prescription drugs by mail coupled with the Defendants' opposition to that activity)

<sup>31</sup> P. Areeda & H. Hovenkamp, *supra*, note 25.

and that certain litigation that had been undertaken was neither baseless nor frivolous. The Court wrote in relevant part:

A different case would result were it shown that state board members were bribed by American, or met in an unlawful fashion with its officers, or were otherwise induced by American, *by means other than legitimate lobbying and publicity*, to take action against mail order houses. Evidence of this sort does not appear on the record. (663 F.2d at 266) (emphasis in original).

Since in the case at bar there was not "legitimate lobbying and publicity," this case once again actually favors OMNI's position, and shows that there is no split of authority among the Circuits.

The remaining cases cited by Petitioner, found at Pet., p. 15, n. 15, all deal with the "co-conspirator" exception to *Noerr-Pennington*.

The Fourth Circuit, of course, did not rely on the "co-conspirator" exception; instead it wrote: "... it is not necessary to consider the issue of whether there is a co-conspirator exception to *Noerr-Pennington* immunity." (Fourth Cir. Op., pp. 23a-24a). Although OMNI has consistently taken the position that there is a co-conspirator exception to the doctrine, and that it should apply here, the issue is not really present at this stage of the case.

In any event, the cases cited by Petitioners, again, do not support their position. OMNI must again draw attention to Petitioner's persistent failure to consider the factual setting of the jury's determination that COA's actions were a "sham." Thus, the Petition's assertion that the Fourth Circuit's position would undermine legitimate lobbying is simply not credible. The cases cited by Petitioners are clearly distinguishable and in fact supportive of OMNI's position. Thus, in *Video Int'l Prod. v. Warner-*

*Amex Cable Communications, Inc.*, 858 F.2d 1075 (5th Cir. 1988), there was an allegation, in effect, that the City of Dallas imposed certain cable TV regulations because the City would obtain monies for the public fisc by being able to restrict franchising; these regulations would damage the Plaintiff and benefit another cable company, which would pay a fee to the City which the Plaintiff did not have to pay. Obviously this is considerably different from the implementation of a long-standing secret agreement between the City and COA to keep COA from having competition and keeping intact the advertising advantage enjoyed by the City Councilmen to the detriment of the public. Further, as the *Video Int'l* court wrote immediately following the portion of the opinion quoted by Petitioners in n. 15 of the Petition:

Although WAX [Private Defendant] argues that the exception [to *Noerr-Pennington*] will not apply unless WAX used coercion or bribery to obtain its end, we do not believe the exception is so restricted. At the same time, however, we do find that the cases indicate that the official with whom the petitioner conspires must, at a minimum, have had *some selfish or otherwise corrupt motive in siding with the petitioner* to result in an illegal conspiracy sufficient to activate the co-conspirator exception. (858 F.2d at 1083) (emphasis supplied).

This case offers no support to Petitioners' position.

Neither does *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886 (9th Cir. 1988). The Court notes that the allegations made (this was a case dismissed on motion) were too sketchy and conclusory, and never involved any assertion that any acts there involved were



undertaken for any purpose "other than *legitimate* petitioning of government." (841 F.2d at 894) (emphasis supplied). In other words, the Plaintiff apparently – and unlike in the case at bar – had no proof that (or at least made no allegation that) the activities of the Defendants were anything other than "legitimate" political activity. Thus, the case did not address the kind and nature of conspiracy and illicit activity proved to have been involved in the case at bar.

*Westborough Mall, Inc. v. City of Cape Girardeau, Mo.*, 693 F.2d 733 (8th Cir. 1983) (*en banc*) said that *Noerr-Pennington* extended to protect "legitimate use of the political process" (693 F.2d at 746), and then specifically reversed a summary judgment in favor of the City and private Defendants "[b]ecause the plaintiffs have presented facts that support an inference of unlawful conduct – city officials may have been induced by the May-Drury defendants by means other than legitimate lobbying to illegally revert plaintiffs' C-4 zoning – the *Noerr* doctrine may not be relied upon to support the district court's grant of summary judgment." (*Id.*). The evidence, outlined at pp. 743 through 745 of 693 F.2d, involved "the close relationship between defendant Drury and city officials, the defendants' concern about the progress of plaintiffs' competing site, Drury's notes to 'stop them from building so maybe we get a chance to build,' and the timing of the reverter of plaintiffs' C-4 zoning only two days after the city council enacted an ordinance that allowed the West Park Mall developers to begin construction." (*Id.* at 743). Clearly the evidence in the case at bar much more effectively demonstrates "illegitimate" conspiratorial activity than does the evidence in *Westborough Mall*. This case substantially supports OMNI.

Finally, Petitioners again cite *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975). That case is very much unlike the present one; the Seventh Circuit began its *Noerr* analysis by noting that "[t]his is **not** a case in which the agency of government itself is alleged to be a part of the conspiracy. . . ." (516 F.2d at 229) (emphasis supplied). Of course, in the case at bar the situation is precisely the opposite. Further, the Seventh Circuit's principal discussion of the point indicates that the mayor and one alderman of the city were persuaded by private defendants to support their application for a CATV franchise, and that the mayor and alderman received from the private applicants \$50.00 in campaign contributions. (*Id.* at 230). Although Petitioners try to analogize this situation to the one in the case at bar, OMNI respectfully submits that the fact that the City of Columbia was found to be a conspirator by the jury, as well as the webwork of interconnections between COA and the various members of the City government, combined with the demonstrated illicit self-interest on the part of all those officials and persons involved (worth much more than \$50.00), amply distinguish this situation from that in *Metro Cable*. In addition, the Defendants undertook acts other than regulatory in implementing their long-standing secret agreement to create restrictive measures to ensure COA's monopoly position. The Mayor verbally attacked OMNI in the news and on the radio (Tr. 224, 356, 1082) and the City made OMNI take down billboards while letting COA keep offensive billboards (Tr. 2074-2076, 3317). COA had a campaign to discredit OMNI (Tr. 506, 822, 1091). COA gathered scandalous information about Mr. Dooner of OMNI (Tr. 2691-2693), and, of course, COA used its agreement with the City in concert with its "double billing" or



stealing in order to further block OMNI's entrance into the market. (e.g. Tr. 3346, 3349, 3353 and 3355).

As this Court wisely pointed out only two terms ago, "... *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931, 1939 (1988). In that case, this Court refused to accord *Noerr-Pennington* immunity to the activities of the Defendant/Petitioner in affecting the product-standard-setting processes of a private association whose decisions were generally widely adopted by state and local governments. Justice Brennan, speaking for seven Justices, rejected an "absolutist" view of *Noerr*:

We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. . . . [I]t is [not] . . . dispositive that packing the Association's meeting may have been the most effective means of securing government action, for one could imagine situations where the most effective means of influencing government officials is bribery, and we have never suggested that that kind of attempt to influence the government merits protection. (*Id.* at 1938-1939) (emphasis supplied).

In the case at bar, we have, as has repeatedly been emphasized and as Petitioners wish to ignore, that "kind" of activity. As Justice White in dissent pointed out in *Allied Tube*: "the *Noerr* immunity-is not unlimited and by its terms is unavailable where the alleged efforts to influence legislation are nothing but a sham." (*Id.* at 1945). That is the OMNI case.

The fact is, thus, that the Petitioners' second question is a non-question in the context of this case, one which is

not presented by the facts nor supported in the Fourth Circuit's analysis of the case.

## CONCLUSION

The only meaningful message that the Fourth Circuit's decision sends to the community is that it is sanctionable under the antitrust laws to corrupt and subvert the political and market processes for private anticompetitive purposes and gain. There is nothing new about this, and nothing wrong with it. The plain and simple fact is that the Defendants got caught in their unusual but mutually beneficial destruction of competition and subversion of the processes of representative government on a local level, and were told to pay for these actions by a jury. The jury's decision was rendered almost four and a half years ago. There is nothing in the case of sufficient national significance to warrant utilizing the limited resource of the time of this Honorable Court and/or delaying justice still longer.

The Petition for Writ of *Certiorari* should be denied.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1969

**CITY OF COLUMBIA and COLUMBIA OUTDOOR  
ADVERTISING, INC.,**

*Petitioners,*  
v.

**OMNI OUTDOOR ADVERTISING, INC.,**  
*Respondent.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

**REPLY BRIEF FOR PETITIONERS**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

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No. 89-1671

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CITY OF COLUMBIA and COLUMBIA OUTDOOR  
ADVERTISING, INC.,

v. *Petitioners,*

OMNI OUTDOOR ADVERTISING, INC.,  
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**On Petition for a Writ of Certiorari to the  
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**REPLY BRIEF FOR PETITIONERS**

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Respondent takes the position that the only real issue in this case is the sufficiency of the evidence to support the jury's findings, and then tendentiously discusses the trial record at length. But such an approach cannot explain away the important legal issues raised by the Fourth Circuit's ruling. Omni makes no serious effort to square that ruling with the governing precedents of this Court. It does analyze at some length the decisions from other circuits cited in the petition. But these analyses, designed to indicate the absence of intercircuit conflicts, can charitably be described as unpersuasive.

1. Respondent's detailed, if one-sided, rendition of the evidence presented at trial apparently is intended to persuade this Court that COA and the City entered into a conspiracy not meriting *Parker* or *Noerr-Pennington* pro-

tections. Nothing in that discussion, however, undermines petitioners' position or otherwise counsels against review.

To begin with, of course, what matters now is the decision of the Fourth Circuit, not the trial record. As we have noted, that court relied solely on evidence (1) that COA, using legal means, lobbied for billboard ordinances in order to protect its market position, and (2) that City officials "agreed" to these requests with the same goal in mind, due to personal relationships with owners of a local business. The petition assumed all of these facts,<sup>1</sup> and showed that they are not sufficient to rule out *Parker* immunity for the City and *Noerr-Pennington* immunity for COA. Respondent has not even attempted to demonstrate otherwise.

Omni's effort to stir up the facts, moreover, adds only to the rhetoric, not the analysis of this case. It constantly repeats the same basic proposition—that there was a "corrupt conspiracy" here because COA and the City acted in concert for the subjective purpose of maintaining COA's business position. Despite this penchant for repetition, however, Omni points to nothing that would suggest that COA went beyond wholly legal and conventional lobbying methods in putting forward its point of view, or that it otherwise subverted the municipal legislative process.

The fact that COA sometimes gave free or discounted billboard space to politicians does not detract from this conclusion, despite respondent's assertion that City official and COA had a "secret, illegal and continuous agreement to utilize mutual resources" whereby legislation favoring COA's market position was exchanged for "unfair advertising advantages to incumbent Councilmen." Br. in Opp. at 3. As the Fourth Circuit noted, there was no evidence that billboard space was offered to City offi-

<sup>1</sup> As the Fourth Circuit indicated, Pet. App. 17a, there was another side to this story presented at trial, but that factual dispute is not relevant here.

cials during the relevant time period. Pet. App. 17a & n.4.<sup>2</sup> More significantly, there is no indication whatever that such donations are illegal or that they became improper in this case because they were linked to an explicit or implicit *quid pro quo*. To the contrary, the donations were identical in nature and effect to campaign contributions, which, as the Ninth Circuit has stated, are a "legal and well-accepted part of our political process." *Boone v. Redevelopment Agency*, 841 F.2d 886, 895 (9th Cir.), cert. denied, 109 S. Ct. 489 (1988). Reliance on such a factor would thus put at risk the vast majority of municipalities and their officials when they take any number of actions affecting private interests.

Plainly aware of these considerations, the court of appeals placed no particular emphasis on the donations in reaching its conclusions. Rather, the court treated these contributions as just one of a number of signs that petitioners acted in concert and for COA's benefit. They were no more or less significant, in the court's analysis, than the fact that the owner of COA sometimes had the Mayor of Columbia over for dinner. See Pet. App. 13a-18a (summarizing "evidence concerning conspiracy").

In sum, respondent has pointed to nothing in this decision below, or the trial record, that would differentiate this case from any typical legislative fight over economic turf. Invariably, in such circumstances, the losing party can allege an anticompetitive "agreement" between its competitor and the government, if only because that competitor has received the governmental response that it requested. Often, especially at the local level, there are personal relationships and/or campaign contributions that can be cited as evidence that the fight was not a "fair" one or

<sup>2</sup> The court referred to donations to the Mayor of Columbia a full four years prior to the relevant year and donations to two Council members in the years after the relevant year. Pet. App. 17a. It acknowledged that this last set of donations to Council members "at best had minimal probative effect." *Id.* at 17a n.4.



that the municipality did not act "independently" and for "public" motives.

It follows that the Fourth Circuit's decision to withhold *Parker* and *Noerr-Pennington* immunities based on such facts largely eviscerates those immunities in the local legislative context. It is one thing, as this Court and other circuits have recognized, to withhold protection where a business wins a competitive advantage through bribery, coercion or some other overt corruption of the political process. See Pet. 9 n.6, 14-18. It is quite another for the federal courts to begin scrutinizing conventional and legal lobbying activities, or the subjective motives of public officials, to ferret out legislative decisions that reflect undesirable "conspiracies."

2. Respondent's effort to find underlying consistencies between the ruling below and the decisions in other circuits cited by petitioners is likewise without merit. In the *Parker* area, as we have shown, the Ninth Circuit has rejected a conspiracy claim just like *Omni's*, on facts that are indistinguishable from those presented here. See *Boone v. Redevelopment Agency*, *supra*. Respondent deals with this case by refusing to discuss it. See Br. in Opp. at 16 n.22. Along with *Boone*, three other cases cited by petitioners hold that subjective anticompetitive motivations of government officials cannot justify withholding *Parker* immunity.<sup>3</sup> *Omni's* answer to these cases is either to ignore the relevant passage, Br. in Opp. at 16-18 (discussing *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985)), or to suggest, quite remarkably, that the issue of subjective motivation—i.e., the reason why the City Council adopted the billboard ordinances—is not raised by the Fourth Circuit's ruling, Br. in Opp. at 19.<sup>4</sup>

<sup>3</sup> See *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985); *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 234-36 (3d Cir. 1987); *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 997 n.7 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982).

<sup>4</sup> The linchpin of the decision below on the *Parker* issue was a reference to the jury's "implicit . . . finding that the City was not

In the *Noerr-Pennington* context, respondent is forced to deal with a line of cases that require a showing of bribery, coercion or some other illegal corruption of the process before successful petitioning of government will be denied protection. Many of these cases specifically reject the notion that an allegation of "conspiracy," without actual corruption, is enough on its own. See Pet. 15 nn. 14 & 15. *Omni* avoids the obvious conflict between these cases and the decision below merely by wishing it away. Like the Fourth Circuit, it reasons that there was a subversion of governmental processes here simply because of evidence that the City acted in order to help COA, and concludes that any lobbying that produced such an outcome must automatically constitute a form of corruption rather than legitimate petitioning of government. See Br. in Opp. at 20.

Such an approach, elevating labels over substance in the application of the antitrust laws to political activities, cannot be squared with the majority rule in other circuits. See Pet. 15. Indeed, the Fourth Circuit's *Noerr-Pennington* analysis carries the court to a new level of illogic. Under *Noerr*, a private party is allowed to seek governmental action, even if its sole motivation is anti-competitive. According to the Fourth Circuit, however, such a party may be held to have violated the antitrust laws if the relevant government officials agree to the request for the wrong reason—i.e., solely to help the private party. Even assuming that there were a basis for inquiring into the motives of governmental officials in applying the *Parker* doctrine, such an inquiry could not play a role in assessing the liability of private parties

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acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry." Pet. App. 9a (emphasis added). See also Pet. App. 12a ("What is not permissible in the *Parker* immunity context, however, is that such private contacts and agreements relate not to the purpose of attaining governmental action but solely to forcing competitors from a particular market.")



under *Noerr-Pennington* without, for all practical purposes, eliminating the doctrine.<sup>5</sup>

### CONCLUSION

The petition for a writ of certiorari should be granted.

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<sup>5</sup> See *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1083 (5th Cir. 1988) (rejecting such a rule as too great a burden on first amendment right to petition) ("In such a case, WAX . . . would have to withhold its petition altogether if it determined that the City might act on it for anti-competitive reasons. Otherwise, the submission of the petition alone might subject WAX to antitrust liability if it were ultimately determined that the City acted for the anticompetitive reasons it shared with WAX . . ."), *cert. denied*, 109 S. Ct. 1955 (1989).

OCT 2 1990

JOSEPH F. SPANOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

CITY OF COLUMBIA and  
COLUMBIA OUTDOOR ADVERTISING, INC.,  
*Petitioners,*  
v.

OMNI OUTDOOR ADVERTISING, INC.,  
*Respondent.*

On Writ of Certiorari to the United States Court of Appeals  
for the Fourth Circuit

**JOINT APPENDIX**

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#### RELEVANT DOCKET ENTRIES

January 11, 1982 —Summons and Complaint filed in United States District Court

December 3, 1982 —Amended Answer of Columbia Outdoor Advertising (COA) and J. Willis Cantey filed

December 6, 1982 —Motion to Dismiss of City of Columbia (City) filed

July 11, 1983 —Order granting in part and denying in part City's Motion to Dismiss

July 21, 1983 —Motion of City to amend Order and Opinion filed

August 7, 1983 —Memorandum and Order denying City's Motion to Amend Opinion

September 16, 1983 —Answer by City filed

August 6, 1984 —Motion of COA and J. Willis Cantey for Summary Judgment filed

August 8, 1984 —Motion of City for Summary Judgment filed

September 4, 1984 —Memorandum in opposition to defendants' Motions for Summary Judgment filed

November 1, 1984 —Motion of City to Dismiss claim for damages filed

November 27, 1984 —Hearing at which Court denied COA, J. Willis Cantey, and City's Motions for Summary Judgment and City's Motion to Dismiss claim for damages

January 9, 1986 —Order dismissing J. Willis Cantey from action

January 10, 1986 —Jury sworn and trial begins

January 31, 1986 —Verdicts for Omni Outdoor Advertising (Omni)

January 31, 1986 —Special Interrogatories to Jurors



February 7, 1986 —Judgment entered for Omni  
 February 10, 1986 —Motion of City for Judgment N.O.V.  
 filed  
 February 18, 1986 —Motion of COA for Judgment N.O.V.  
 filed  
 November 17, 1988 —Order granting COA and City's Motions  
 for Judgment N.O.V.  
 November 18, 1988 —Judgment entered for COA and City  
 November 28, 1988 —Notice of Appeal of Omni filed  
 December 15, 1989 —Court of Appeals enters Judgment for  
 Omni  
 February 15, 1990 —Court of Appeals denies COA and City's  
 petition for rehearing and suggestion for  
 rehearing en banc

**DISTRICT COURT'S ORDER DENYING  
 CITY OF COLUMBIA'S MOTION TO DISMISS  
 [PAGES C.A. APP. 41-50]**

**IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF SOUTH CAROLINA  
 COLUMBIA DIVISION**

Civil Action No. 82-2872-0

OMNI OUTDOOR ADVERTISING, INC.,  
 Plaintiff,

vs.

COLUMBIA OUTDOOR ADVERTISING, INC.,  
 J. WILLIS CANTEY and the CITY OF COLUMBIA,  
 Defendants.

**APPEARANCES:**

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By: A. Camden Lewis and  
 Randall Chastain, Esqs.

**OPINION**

[Filed July 11, 1983]

MACMAHON, *District Judge.*

Defendant City of Columbia ("Columbia") moves to  
 dismiss the complaint for failure to state a claim upon

which relief may be granted, *see* Fed.R.Civ.P. 12(b)(6), on the ground that it is exempt from liability under the federal antitrust laws and immune under state law. Plaintiff ("Omni") alleges that defendants have violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1- & 2, and state law.

The allegations of the complaint, which we accept as true on this motion to dismiss, are as follows:

Omni is a Georgia corporation engaged in erecting billboards and leasing space on them to advertisers. Defendant Columbia Outdoor Advertising, Inc. ("COA") is a South Carolina corporation engaged in the same business. Defendant J. Willis Cantey, a South Carolina resident, is majority stockholder and chairman of the board of COA. Defendant Columbia is the capitol of South Carolina and a municipal corporation located in Richland County.

Omni entered the Columbia, South Carolina, market in the fall of 1981. COA, then owner of more than 95% of the billboards in that market, conspired with the other defendants to prevent Omni from competing effectively. The alleged overt acts were: (1) defendants caused the zoning commission of Columbia to abdicate to the Columbia City Council its responsibility for regulating the construction of billboards; (2) defendants caused the City Council to pass two ordinances banning the construction of billboards and a third ordinance containing "burdensome standards regulating the construction and erection of billboards;" (3) COA caused Richland County to enact an ordinance containing standards regulating the construction of billboards which has had a detrimental effect on Omni while benefiting COA; (4) defendants have "interfaced with and poisoned" contractual relationships between Omni and other parties by making "false and malicious verbal and/or written reports and statements . . . with the intent of destroying [Omni's] business;" and (5) COA has spread false rumors about Omni's busi-

ness and charged rates below its cost in order to drive Omni out of the Columbia market.

Defendant Columbia's motion to dismiss should be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

## I. Federal Antitrust Claims

### A.

Defendant Columbia argues that, for the conduct complained of by Omni, it qualifies for the municipal exemption from the federal antitrust laws. A municipality is exempt from liability arising from a municipal ordinance if the ordinance "constitutes the action of the [state] itself in its sovereign capacity . . . or . . . constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. . . ." *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982). As evidence of a "clearly articulated and affirmatively expressed state policy," defendant Columbia points to S.C. Code §§ 5-23-10 *et seq.* & 6-7-10 *et seq.* Plaintiff disagrees.

Fortunately, we are not required to answer the nice question whether the cited sections of the South Carolina Code satisfy the *Boulder* requirements. The complaint in this case simply does not allege that the three ordinances passed by the City Council violated the antitrust laws; rather, it alleges that defendants conspired to violate Sherman Act §§ 1 and 2 and that the ordinances were three of the many overt acts committed in furtherance of the conspiracy. In other words, the evil plaintiff complains of is not the ordinances standing alone but rather the conspiracy. It is within the realm of possibility that evidence upon a trial might show corruption or bad faith anticompetitive actions on the part of city officials, *see*



generally *P. Areeda*, Antitrust Law § 203.3c (Supp. 1982). We cannot say, therefore, that plaintiff can prove no set of facts in support of its claim of conspiracy that would entitle it to relief. *Conley v. Gibson*, *supra*.

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the defendants' counterclaim alleged that plaintiff municipalities, which owned and operated electric utility systems, had conspired to violate the antitrust laws. The plaintiffs moved to dismiss the counterclaim on the ground that they were exempt from liability under the federal antitrust laws. The United States Supreme Court ruled that the cities would be exempt for anticompetitive conduct engaged in "pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413. But the Court remanded the case to the district court for determination whether the cities' actions were directed by the state. There is no reported decision on remand.

Following *City of Lafayette*, in four cases courts refused to dismiss claims that cities had conspired to violate the antitrust laws. See *Whitworth v. Perkins*, 559 F.2d 378, 379 (5th Cir. 1977), *vacated for reconsideration in light of City of Lafayette [supra]*, 435 U.S. 922, *reinstated*, 576 F.2d 696 (5th Cir. 1978), *cert. denied sub nom. City of Impact v. Whitworth*, 440 U.S. 911 (1979); *Schliessle v. Stephens*, 525 F. Supp. 763, 776 (N.D. Ill. 1981); *Stauffer v. Town of Grand Lake*, [1981-1] Trade Cas. ¶ 64,029 at 76,330 (D. Colo. 1980); *Cedar-Riverside Associates, Inc. v. United States*, 459 F. Supp. 1290, 1299 (D. Minn. 1978), *aff'd on other grounds sub nom. Cedar-Riverside Associates, Inc. v. City of Minneapolis*, 606 F.2d 254 (8th Cir. 1979). Moreover, in two of these cases, the courts reached this result after explicitly ruling that the cities' alleged actions, standing alone, were exempt from the antitrust laws. Thus, these two courts explicitly recognized the distinction between an allegation that a city's action violated the antitrust laws and an

allegation that a city conspired to violate the antitrust laws. See *Stauffer v. Town of Grand Lake*, *supra*, [1981-1] Trade Cas. at 76,328-30; *Cedar-Riverside Associates, Inc. v. United States*, *supra*, 459 F. Supp. at 1298. In only one case was a motion to dismiss such a claim granted, see *Crocker v. Padnos*, 483 F. Supp. 229, 232 (D. Mass. 1980), and in that case it appears that the court simply overlooked the distinction.

We have no doubt that the better result is to deny a motion to dismiss when the arguably exempt actions of the municipality do not stand alone but are only some of the overt acts of an alleged conspiracy. Simply put, the plaintiff is entitled to an opportunity to prove the alleged conspiracy.

#### B.

Defendant Columbia also makes the novel argument that municipalities, when acting "in areas involving substantial governmental interests and goals," are immune from liability under the federal antitrust laws by virtue of the tenth amendment to the United States Constitution, citing *National League of Cities v. Usery*, 426 U.S. 833 (1976). We reject this argument. The law is

"in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States.' . . . Second, the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.' . . . And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' "

*Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 287-88 (1981). The Sherman Act meets none of these requirements.



## II. State Claims

Plaintiff makes the following claims under state law: Count III, violation of S.C. Code § 39-3-130 (agreement in restraint of trade illegal); Count IV, violation of § 39-3-120 (monopolies illegal); Count V, violation of § 39-3-10 (anticompetitive combinations illegal); Count VI, tortious interference with and destruction of plaintiff's business (no statute cited); Count VII, destruction of plaintiff's business reputation and goodwill (no statute cited); and Count VIII, unlawful interference and unfair competition with plaintiff's business (no statute cited).

Defendant Columbia makes two arguments in support of its motion to dismiss the state law claims. Its first argument is that it is immune from liability for torts; plaintiff does not meet this argument in its opposing memorandum. Our research indicates that municipalities in South Carolina are immune from all tort claims except those for which the legislature has specifically waived sovereign immunity. See *Belue v. City of Spartanburg*, 276 S.C. 381, 280 S.E.2d 49 (1981); *Furr v. City of Rock Hill*, 235 S.C. 44, 109 S.E.2d 697, 698 (1959). Plaintiff has not called to our attention, nor have we found, any statute which waives the sovereign immunity of municipalities for the torts plaintiff alleges in Counts VI through VIII. These counts, therefore, must be dismissed.

Defendant Columbia also argues that it is shielded from liability under the state antitrust laws by S.C. Code § 39-5-40, which provides:

"Section 39-5-40. *Article inapplicable to certain practices and transactions.*

Nothing in this article shall apply to:

(a) Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law.

(b) Acts done by the publisher, owner, agent or employee of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and did not have a direct financial interest in the sale or distribution of the advertised product or service.

(c) This article does not supersede or apply to unfair trade practices covered and regulated under Title 38, Chapter 55, Sections 38-55-10 through 38-55-410.

(d) Any challenged practices that are subject to, and comply with, statutes administered by the Federal Trade Commission and the rules, regulations and decisions interpreting such statutes.

For the purpose of this section, the burden of proving exemption from the provisions of this article shall be upon the person claiming the exemption."

Defendant Columbia has not seen fit to tell us or Omni whether it claims exemption under subsection (a) or (d) or both. Omni asserts in response that defendant Columbia has not met the burden of proving exemption, and, focusing on subsection (a), that there is no such regulatory body or officer involved with the statutes relevant here.

It is clear that the acts of defendant Columbia alleged in the complaint are not exempt under either subsection (a) or (d). In *Bostick Oil Co. v. Michelin Tire Corp., Commercial Division*, 702 F.2d 1207 (4th Cir. 1983), the Fourth Circuit Court of Appeals held, as to subsection (a), that the defendant's actions were not exempt merely because the defendant asserted that "its conduct in a particular case might not be illegal" under the federal antitrust laws. *Id.* at 1220. As to subsection (d), the court reasoned that if the claim against the defendant

were not exempted by subsection (a), which applies to actions "permitted" by other law, it would not be exempted by the narrower subsection (d), which applies to actions complying with statutes administered by the Federal Trade Commission. *Id.* at 1219 n.24. Following *Bostick*, we must reject defendant Columbia's argument that the actions in the complaint are exempt under § 39-5-40.

Accordingly, defendant Columbia's motion to dismiss is granted as to Counts VI, VII and VIII, and denied in all other respects. The Clerk of the court is directed to enter judgment dismissing Counts VI, VII and VIII of the complaint as to defendant Columbia.

So ordered.

Dated: New York, N. Y.

July 8, 1983

/s/ Lloyd F. MacMahon  
LLOYD F. MACMAHON\*  
United States District Judge

\* Of the United States District Court for the Southern District of New York, sitting by designation.

**EXCERPT FROM OPENING STATEMENT OF  
MR. HEYWARD McDONALD [PAGE C.A. APP. 145]**

The burden of proof, as his Honor has explained to you, is on them, is on them. They are going to try to prove first that Columbia Outdoor, and the City conspired to pass the moratorium and the ordinance against them as though Columbia Outdoor could direct and control Mayor Finlay, Patton Adams, Bill Ouzts, Paul Bennett, Rudy Barnes, and I know they will be very interested to find out that Omni thinks that a local company can control them and their votes on behalf of the citizens of Columbia, South Carolina. We will show that Omni



**OPENING STATEMENT OF MR. JIM MEGGS**  
**[PAGES C.A. APP. 153, 155]**

In doing so and in proving that contention, it becomes the burden of Omni Outdoor Advertising to prove that conspiracy to you. They must prove a fact situation which draws you to the inescapable conclusion that there must have been an agreement between this five counsel members and the principals in Columbia Outdoor Advertising. That I am sure will not be done in this litigation.

I am satisfied that you will find that there was no conspiracy; that the City Council did in fact consider the public interest and passed a measure finally that was indeed enacted solely for the purpose of protecting the public of the City of Columbia.

**EXCERPTS FROM TESTIMONY OF**  
**WILLIAM B. HARKINS [PAGES C.A. APP. 156, 167,**  
**169, 182-185, 187, 198-200, 213, 224-225]**

Q Mr. Harkins, give us your full name?

A My full name is William B. Harkins.

Q Where do you live?

A I live at 2012 Edge Drive, North Myrtle Beach, South Carolina.

Q How long have you lived there?

A I have been there four years.

Q Before that where were you?

A I was in Indianapolis, Indiana.

Q What did you do in Indianapolis?

A In Indianapolis I was president of Naegele.

N-A-E-G-E-L-E. I was president for four years of Naegele Outdoor Advertising Company prior to coming to Myrtle Beach and with Omni.

No other medium is as low in cost per thousand or cost for advertising as outdoor advertising. It makes the small advertiser look as big as the national advertiser. For instance when a small advertiser buys a poster board or painted bulletin, as you see here, he is just as big as the national advertiser. That is why local advertisers like to use outdoor advertising, because it makes them look as big as the biggest advertiser.

Q This factor of uniqueness you talk about, how important is that during the political season?

A Well, as you know politicians are the first to buy outdoor advertising and it is—We are pressured, as a matter of fact, all outdoor plants are pressured by politicians to get their boards up. They want to get elected. They understand the effectiveness of outdoor advertising. You must have the distribution to handle your local advertisers, your regional advertisers, your national ad-



vertisers and politicians as they come in and out from time to time.

Q So we have the zoning, I think you said, Mr. Harkins, where you have a pole on one side of the street and then you couldn't put another one for so many feet; is that correct?

A That is correct.

Q That is one type, is that right?

A That is correct, sir.

Q That is called one side of the street spacing; is that correct?

A Spacing. It is referred to in most ordinances around the country as spacing.

Q Then I suppose there is another kind. If you had the same street where you put a sign here, where you have spacing on this side, is that correct?

A That is correct.

Q And also they would consider you would have to be so many feet on the other side, too?

A That is correct.

Q That would be double side spacing?

A That's correct. It is usually on either side of the highway.

Q So you would have to have so much spacing from here on this side, too?

A That's correct.

Q These type, too, are the normal type you run into around the country?

A Yes, along with others.

Q Then, I believe, you have a spacing where or a type of zoning where they come in and say this is a housing area and they won't let you build any signs?

A A protectionist area or an area not zoned for outdoor advertising. Outdoor advertising is usually on commercial or industrial property. Naturally we wouldn't want to go into residential areas. So by zoning we are

only allowed in a residential area. You are only allowed in industrial and commercial.

Q So there is excluded areas?

A That's correct.

Q Excluded areas?

A That's correct.

Q Then there is a type called radial zoning; is that correct?

A Yes, sir, radius zoning.

Q What does that mean?

A That takes the sign location and draws a circle or a radius.

Q We couldn't have any signs anywhere in here?

A That is correct.

Q That might mean you have a sign on this street, and over here you couldn't have one even though you couldn't see one from the other?

A That's correct.

Q And this is a very restrictive type zoning?

A Very.

Q What?

A Yes, sir.

Q Is it rare?

A Yes, sir.

Q What is the usual purpose of this radial type zoning?

A To stop the nesting or gate, one sign across the other, or back from a residential area or a park or historic site.

Q Like they would say this is a historic site, you couldn't have a zone in so many feet?

A Nor would we want to, that's correct.

Q Then there is a final type zoning you find, what type is that?

A I guess you are referring to amortization.

Q Amortization. What is amortization zoning?

A Amortization zoning is where you are given a length of time to amortize your outdoor advertising structures

and then have to take them down. That can be from—I heard it from two years to five years to ten years. It is a way of having your signs taken down over a period of time, amortization.

Q So if a city, for example on exhibit five, if they didn't like these type structures—

A They could amortize it.

Q They could say you could leave them up for so many years and then you have to take them down?

A That is correct, sir.

\* \* \*

Q Mr. Harkins, you know Columbia, Lexington, what is the key to the Columbia market?

A The key to the Columbia market again is the core area, and those arteries adjacent that lead in and out of the core area. That is paramount as well as all of the market available. That is the primary.

Q You got Lexington County over here?

A Yes, sir.

Q You got Richland County around here?

A Right.

Q The key to this whole distribution and whole concept of a plant is to have a distribution that centers itself on the core?

A The core and act like a wagon wheel.

\* \* \*

A Mayor Finlay said in an interview on the radio that, "Everything was fine until Omni came to town." Verbatim, "Everything was fine until Omni came to town." I will never forget it.

Q Did you ever go to any meetings?

A Yes, sir, I did. I was at a meeting on a couple of occasions. Mayor Finlay asked some representatives from Omni Outdoor to stand up. We were at a council meeting. Mr. Stuckey, the gentlemen I mentioned earlier, was acting manager of the plant, stood up. I have never seen at a council meeting and I have been to many a one, a

taxpayer and a businessman take the kind of rough abuse that Mr. Stuckey took from Mayor Finlay about Omni Outdoor being in town.

I can quote him as to what he said that night. He asked Mr. Stuckey were we going to build another big sign like this painted bulletin that was located at the Town House, any more of those big ugly signs in town. Again, as I couldn't believe what I heard on the radio, I couldn't believe what he said in the council meeting. That is for the record. Mr. Stuckey was standing up as in the dock. I am reminded that Columbia Outdoor was present and so was Minnesota Mining, another sign company here. None of those representatives were ever singled out or asked a question.

\* \* \*

A Mr. Gray Olive. Mr. Stuckey and I.

Q Who is Mr. Gray Olive?

A I guess his title is City Manager.

Q City of Columbia Manager?

A City Manager of Columbia. He called and asked us to come for a meeting. I remember we asked him at the time would Columbia Outdoor be there, would they be there?

A He said, "No, this just a meeting with you all. We are working on the ordinance. We want to work out some things with you folks." We went up there on good intention.

Q What was that meeting like?

A We were sat down and we were told here is how it is going to be. That was about the substance of it. He asked me personally what we thought of amortization and some other things, basically, and after that he said this how it is going to be. I never had gone to a meeting like that. I don't know why we had the meeting. As a matter of fact, I told him that.

I said, "Why did you ask us here to talk about negotiating an ordinance, and there is no negotiating. We are being told what to do and how it is going to be?" It



was a very rough and abrupt meeting. I was simply told how the ordinance was going to be. I was with Mr. Stuckey at that particular meeting.

. . . .

A I think I mentioned it earlier, it was a good zoning environment. The spacing was very good. There were no real zoning problems per se. I would overall say it was a well zoned market for outdoor advertising.

. . . .

Q Go ahead and characterize that in your own words. What happened at that meeting when Mayor Finlay was talking to Mr. Stuckey?

A Well, again I thought it was the roughest confrontation I ever seen at a council meeting. It was as much arrogance as I ever seen displayed at a meeting. I am a quiet person myself. I was almost at a point of getting up and saying something myself to defend this man who was being put in the dock. Again, it was almost a vehement attack.

Q What was your feeling with reference to the input of Omni to that meeting?

A None.

. . . .

A I will be honest. I don't get that way often. I had a real pit in my stomach. I never seen it any rougher. I saw the handwriting on the wall.

Q When you had a meeting with Mr. Olive, what was your feeling with reference to the input you could have at that time meeting?

A Absolutely none. The handwriting on the wall, iced out, dead.

. . . .

**EXCERPTS FROM TESTIMONY OF  
ROBERT T. MORGAN [PAGES C.A. APP. 282, 297-300]**

. . . .

Q Can you give us your name, please?

A Robert T. Morgan.

Q Where did you live, Mr. Morgan?

A Atlanta, Georgia.

Q What do you do in Atlanta, Georgia?

A I am an attorney.

. . . .

Q What did Mr. Bates say? Who is Mr. Bates?

A I was told Mr. Bates was the city attorney and present at the meeting. I had in my discussions, I think with Mr. Selmon, got the impression that there was going to be a new moratorium because they felt the old one was going to be unconstitutional.

Q When you were talking to him prior to July 21, 1982, you say you got the impression what?

A I got the impression they realized their first moratorium had some Constitutional problems and probably would be struck down, in that they were going to try and pass a new moratorium as quickly as possible to take a more Constitutional moratorium without the Constitutional problems of the previous one. That is why I came to the City Council to try and convince them they should pass an ordinance that should be a reasonable ordinance rather than a flat moratorium.

Q When you handed the document, the exhibit just introduced, to Mr. Bates, what did he say?

A He read it and then I think he basically chuckled and said you can't sue the city. That was the extent of my conversation.

Q What kind of reception did you get from Mr. Bates?

A It was pretty hostile.

. . . .



Q Again, you wrote these two to Mr. Bates and looking at Exhibit 15, was that the ordinance stipulated to and given first reading at the meeting?

A That's correct.

Q What does that ordinance say?

A Shall I just read the actual controlling language?

Q Yes, sir.

A "It shall be unlawful hereafter for any person to erect within the City of Columbia any billboard or sign for off premises commercial advertising.

Q Was there already a moratorium in effect at that time?

A That is correct.

Q When were you supposed to have your hearing on the old moratorium in the court?

A Approximately two days.

Q Afterwards?

A Afterwards.

Q Indeed, did you have that hearing two days afterwards?

A Approximately, yes, sir.

Q What was the result of the hearing?

A It was declared—The original moratorium was declared unconstitutional.

Q So in effect, they had covered that by passing a new ordinance two days earlier?

A Right. It was my impression they anticipated that was going to happen.

. . . .

**EXCERPTS FROM TESTIMONY OF  
SCOTT McKINLEY [PAGES C.A. APP. 345, 353-357]**

A Scott McKinley.

Q Where are you from, Mr. McKinley?

A I live in Baton Rouge, Louisiana.

Q What do you do in Baton Rouge?

A I am president of McKinley Outdoor Advertising.

. . . .

A The meeting was to get together to discuss the moratorium that the city had put in a week earlier, and the possibility of a new ordinance.

Q Would you go ahead and—Who was at the meeting?

A Myself, Bob Bostic, Willis Cantey, Cantey Heath, I believe Jim Cantey and with the city was Terry Floyd.

Q What happened at the meeting?

A Basically we had sat down and Terry Floyd had suggested that the new spacing law should be 750 feet. Our contention was it should be 500 feet and just keep in accordance with the Federal regulations and laws.

It was a cordial meeting until towards the end of it where Willis Cantey seemed to get very irate and upset. He said that they didn't have any problems with the city until we came into the market; that he warned us not to come into the market but we came anyway. Now, the roof was caving in on us and it was our fault. That he wanted 1,000 foot spacing and was going to go to the City Council to get it.

. . . .

A We put up an inflatable eagle that is made out of a very thick vinyl. It has a blower behind it that keeps it inflated. It comes out from the face of the board. It had a 50 foot wing span. We put it up. The copy line was Columbia, Your Progress Is Soaring. It was a public service. We took the expense to ourselves to put it up and try to get along with the city and introduce ourselves to the city.

Q Was there any comments to you or at any City Council about that?

A Yes. We got phone calls that was going to have to be taken down.

Q Why?

A We found out at the City Council meeting—Let me go over how the meeting went. I went to the City Council meeting and there was an obscure part of the ordinance that dealt with signs that had moving objects on it. They were claiming, which may have been true, that when the wind hit the wings, they would raise slightly because they were tied down and bolted down. They would raise slightly. They read part of the ordinance off.

It was our turn to speak in defense. When it was our turn to speak, Mayor Finlay was very upset and irate. Stood up, pointed his finger at us and told us we would be taking down the eagle because we did not ask his permission to use the name "City of Columbia."

Q Subsequent to that, did you take the eagle down?

A Yes, we did.

Q Did you try to speak out or get a chance to give your story?

A No, I did not get the chance.

Q Excuse me?

A No, I did not. No.

Q Did anybody with Omni get the chance?

A I don't believe anybody did.

Q What was the atmosphere at that meeting?

A Very hostile. He seemed to have taken it personally that we had put the eagle up.

\* \* \*

**EXCERPTS FROM TESTIMONY OF DAVE MERRY**  
[PAGES C.A. APP. 384-385, 389-391, 393-394]

\* \* \*

Q Would you give us your name please?

A Dave Merry, M-E-R-R-Y.

Q Where did you live?

A 5145 Lake Shore Drive, Columbia, South Carolina.

Q What did you do?

A I am a lawyer in the firm of Merry and Higgins in Columbia.

\* \* \*

Q Let's talk about before the order that you had from Judge Cureton, did you talk with them about the lawsuit?

A Yes, sir. I talked with them about the merits of the lawsuit.

Q What did they tell you?

A Well, basically their position was—I think they had informed City Council that the form in which they had passed the moratorium was in all likelihood unconstitutional and subject to attack. They reiterated that to me. We were trying to compromise, trying to reach some sort of a spacing.

Q Would you go over that again, I am not sure I understood it. They reiterated what?

A They reiterated to me that they did not have much faith in their ability to defend my lawsuit. By the time we could do anything about it they would have in effect the new ordinances which was going through the process. By the time we could get an order from the Judge declaring the moratorium unconstitutional, they would have the new act in place so they weren't very willing to negotiate.

Q How would you characterize that?

A Well, Mr. Bates and Mr. Meggs are very good advocates for the city and they do what the city tells them to. I think they informed the city they passed an ordinance that was unconstitutional and the city told them



to defend it the best they could until they got the new act up, I assume. That is what occurred.

Q That was for purposes of delay?

A Certainly. That is what I was informed.

Q Who informed you of that?

A Someone in the city attorney's office. It would have been Mr. Meggs or Mr. Bates.

Q One of the two here?

. . . .

Q After you got the order, what happened with reference to the City of Columbia?

A After we got this ordinance—This order basically allowed Omni to go back and put up the signs they had been stopped from putting up.

Because of some technicality with regard to, I believe, one of the locations and also with regard to, I believe, their interpretation of the new ordinance which was passed as soon as the order was issued by Judge Cureton, within a very short period of time the city put into place a new ordinance. We were threatened if we attempted to put up some billboards that our people would be arrested on the site by city policeman. It caused a great deal of concern to my clients.

. . . .

A I believe I did. I went to the meeting that I heard Mr. McKinley testifying to earlier, and I am not sure if it was the same one Jimmy was at or not, it may have been. I was at the meeting and representing my client at the meeting. As a matter of fact, I was before the council at the time Mayor Finlay took it upon himself to chastise and berate the people at Omni. He really took quite a time to express his views on their coming into the city and putting up billboards in the city. It was an emotionally charged moment. He was quite vociferous and very adamant in his comments. I was embarrassed for my clients and Mayor Finlay quite frankly.

Q Did he jump on anybody else?

A No, sir.

Q How would you describe the atmosphere there at that time?

A It went beyond the bounds of what I have ever seen at a City Council meeting. I never seen the Mayor get up and literally address somebody down, even if you are opposed to somebody. It was a very emotionally charged atmosphere. More so than I ever seen at a council meeting over something like a building permit.

. . . .



**EXCERPTS FROM DEPOSITION OF  
J. WILLIS CANTEY (8/23/83) [PAGES C.A. APP.  
451, 548-549]**

Q Give me your full name please.

A J. Willis Cantey.

Q Where do you live?

A 1400 Westminister Drive, Columbia.

Q How old are you, Mr. Cantley?

A Sixty-six.

Q What do you do at this time? What job do you have?

A I'm retired.

Q Do you remember this letter that you wrote Mr. Naegele?

A Yes.

Q Mark that.

**PLAINTIFF'S EXHIBIT NUMBER NINE MARKED  
FOR IDENTIFICATION**

Q Do you remember writing this to Mr. Naegele?

A Yes.

Q It says in here the mayor of Columbia and the four councilmen are very good friends of ours. I discussed your suggestion with the mayor about reworking our existing sign ordinances and he promptly said no problem. My son Jim has begun a study to determine exactly what restrictive measures we should request. Is that true?

A Sure.

Q Do you know the date of this letter is December 16, 1980?

A No, I didn't know that. Okay.

Q So contrary to what you earlier testified to back in December 16, 1980, you are going to get from your friends a sign ordinance that you want?

A Mr. Lewis, Mr. Dooner wasn't even in—

Q Is that what it says?

A Yes. He wasn't even in this market.

Q No, sir. I asked you when you first got involved with sign ordinances in Columbia and you told me it was 1981 or '82 and you're back as far as 1980, you are in here getting an ordinance for your own benefit?

A You know why I did that? To keep Mr. Naegele out. He was buying everything, Greenville, Spartanburg, Gastonia, Greensboro, Asheville, right all over me. Dooner wasn't even in it.

**EXCERPTS FROM TESTIMONY OF  
WILLIAM J. DOONER [PAGES C.A. APP 603-604,  
664, 675]**

Q Give us your name, please?

A William J. Dooner.

Q Where do you live?

A In Atlanta, Georgia.

Q What do you do?

A I am in the outdoor advertising business. A shareholder in a number of companies, and, of course, other business interests as well.

Q Are you one of the shareholders or the main shareholder of Omni Outdoor Advertising in Columbia?

A I am approximately 65 percent owner.

He shocked me with his last comments before as we left the Ionosphere Room and outside the Ionosphere Room before he went—Opposite the room it was one of the gates in the new terminal in Atlanta and the man looked me right in the eye and smiled and said, "Do you think I should talk to my good friend, the Mayor, and get 1,000 foot spacing?" As God is my judge, may I never see tomorrow if he didn't say it.

A Mr. Cantey had told me I can't cash flow or make any money on 98 panels and seven bulletins. On December 31, 1981, we had 78 poster panels and seven painted bulletins. We had a number of leases and permits that were in process and construction continued up to the moratorium time. Some of the structures were built in the county, so that number grew from 78 to 98.

He said to me and rightfully so, that we could not cash flow a business. Meaning we would not be able to make a profit from 98. It is like building a 60 room hotel when you need 150 to break even. He knew it, and

the moratorium passed and a severe ordinance was coming in.



**EXCERPTS FROM TESTIMONY OF  
RICHARD STUCKEY [PAGES C.A. APP. 825,  
921-923, 1007]**

Q Give us your name, please?

A Richard Stuckey.

\* \* \*

A I was with Omni Outdoor Advertising.

\* \* \*

Q What does Plaintiff's Exhibit 77 show?

A It shows what we would call a case of double billing.

Q Whose invoices are those?

A Those are Columbia Outdoor Advertising invoices.

Q What do they show?

A They show what we would call double billing.

Q What is that?

A Double billing would be charging, selling the same board twice. In other words, once to one client and once to another client for the same time period.

Q What does that do?

A What that does is take certain key locations and make them, make one board into two. Usually it is done by covering up clients who have long term contracts and who are not located in the city, so they don't ride by their billboards daily. It takes a crown jewel and makes it two crown jewel locations.

Q In that case what does that exhibit show?

A It shows that Phillip Morris was billed for a board on Gervais Street.

Q What location was that?

A That is 2400 Gervais Street panel number two, and that Morris Shue, Richway, was billed for the same board at 2400 Gervais Street, panel two.

Q And Phillip Morris is what you would call what kind of advertiser?

A Cigarette advertiser, tobacco company.

Q Is it national?

A Yes, sir.

Q What kind is the other advertiser, Richway?

A That is a local advertiser.

Q I show you this set of documents, could you identify those?

A Yes, sir, I can.

Q What are those?

A Two Columbia Outdoor Advertising invoices and two location lists.

MR. McDONALD: No objection.

MR. MEGGS: No objection, your Honor.

THE COURT: Admitted.

(Plaintiff's Exhibit 78 received in evidence).

Q Looking at Plaintiff's Exhibit 78, what does it show?

A It shows two Columbia Outdoor Advertising invoices. One to Brown and Williamson Tobacco Company, the other to Midland Trane Company of Columbia whereby Brown and Williamson was billed for a location at Two Notch at Val Vista. Number 4 and Midland Trane was billed for the same location, Two Notch and Val Vista number 4.

Q For the same time period?

A Overlapping time periods.

Q What is Brown and Williamson, what kind of advertiser?

A It is a tobacco company.

Q Is it national?

A Yes, sir.

Q What is the other advertiser, Midland Trane?

A Midland Trane would be a local advertiser.

\* \* \*

Q Now, you said that you recommended to Mr. Bennett a 500 foot ordinance and he replied that will never fly?

A That's right.

Q Are you sure of that?

A Yes, sir. He said City Council would never accept it.

\* \* \*



EXCERPTS FROM TESTIMONY OF  
SUZANNE FLOWERS [PAGES C.A. APP. 1064-1065,  
1069-1073]

Q Would you give us your name, please?

A Suzanne Flowers.

Q And where did you live?

A I live at 902 North Lucas Street

Q Here in Columbia?

A West Columbia.

Q Before that, what did you do?

A Before that I worked with Omni Outdoor Advertising here in Columbia.

Q Explain this picture, what happened?

A Do you want me to start from the beginning?

Q Explain the whole thing. What about that picture?

A Columbia Outdoor and I were both calling on Intertec Data System trying to sell them a billboard showing for Christmas.

Q What year was that?

A This was '83?

Q What were you looking at while you were riding around?

A We were looking at billboard locations.

Q What billboard locations were you looking at?

A We were looking at all billboard locations. The locations I had chosen for this particular showing.

Q Were you looking at locations that other people had mentioned?

A Yes.

Q And whose locations were those?

A Columbia Outdoor's locations.

Q Go ahead.

A Anyway, I ended up losing the business. They ended up buying from Columbia Outdoor. As Rich Stuckey and I were riding down Two Notch Road, we stopped and took this picture. We noticed that Intertec was covering up an R. J. Reynolds or Winston board, and this happens to be one of the boards that he told me that Columbia Outdoor told him he could have.

Q Was this location that you were looking at, is this a location of Columbia Outdoor?

A Yes.

Q Was that one of the locations you looked at when you were riding along with Mr. Wells?

A Yes.

Q Go ahead?

A We took the picture. I know that RJR buys their billboards for a year at a time and this wasn't right.

Q Why do you say that wasn't right?

A Because they were covering up an advertiser that buys a board for a year at a time with another advertiser, a local advertiser that only buys for one month.

Q What happened after that?

A After that—Oh, I believe, it was either the next week or two after that was posted the RJR representative came to visit Columbia.

Q What do you mean the RJR representative?

A He comes once in a while to ride his billboards to make sure they look okay and they are where they are supposed to be.

Q Was he coming to see you?

A He was coming to see Omni, and also Columbia Outdoor. He sees us both at the same time.

Q Had he given you prior notice he was coming?

A Yes.

Q What happened with reference to this board?

A Well, right before he came into town Winston was put back up on the board.

Q Did you see that?

A Yes.

Q Now, what happened at the bus station with reference to your paper, I believe you call it?

A Yes.

Q Explain what paper is?

A Paper is what we use to put up the billboard. It is what the client, the production, what the ad actually says. This paper comes by bus, Grayhound to us from the poster company that makes the paper. Columbia Outdoor and Omni both receive their paper at the same bus station. There has been many occasions where Columbia Outdoor has picked up my paper from the bus station in error.

Q What advantage does that give them?

\* \* \*

Q What advantage did that give them in picking up your paper?

A A couple of advantages is they could see what clients that I had sold to because it had it written on the front of the package for one thing. They could see how many posters I ordered. They could also hold the paper so that I couldn't get my billboards up on time.

Q Was that a problem?

A Yes.

\* \* \*

EXCERPTS FROM TESTIMONY OF BOB BOSTIC  
[PAGE C.A. APP. 1082]

\* \* \*

Q What happened with reference to that eagle?

A It caused quite a stir, particularly in the city offices.

Q What happened, did anybody say anything to you about it?

A The Mayor got quite upset.

Q When was that, do you remember; was that at a meeting?

A It was a City Council meeting.

Q What happened?

A I attended the City Council meeting and the Mayor was quite irate about the situation. He called the billboard an atrocity. He wanted to know who gave us permission to put it up. When I told him what had transpired, that I had gone to the Chamber of Commerce, he said that he didn't give us permission and if he didn't give us permission he was going to see to it that it was taken down.

Q Was he mad?

A Yes he was very irate.

\* \* \*

EXCERPTS FROM DEPOSITION OF  
J. WILLIS CANTEY (8/30/85) [PAGES C.A. APP. 1145,  
1179-1180, 1192]

J. Willis Cantey, being duly sworn, testified as follows:

Q Yes, sir. If you, Mr. Cantey, if you could use a very good location twice for the support of bad locations, that would be very advantageous to you; wouldn't it?

A I would—on paper, I would think it would. We don't do business that way.

Q I understand. But that would as a matter of—if that happened, that would be very advantageous to you; wouldn't it?

A Well, it would just be like stealing, that's what it would amount to.

Q And you couldn't—

A We don't do it, that's all.

Q I understand that. And it would give you a very big edge over your competitor; wouldn't it? It would give you an extra good location; wouldn't it?

A Yes, it would

Q So there should be a corrected invoice for this one if it's not true?

A I would think all of them would be the same way.

Q So if we say that there are no corrected invoices, what do we say for that, Mr. Cantey?

A I don't know whether there were any or not, but I say I assume that there could be.

Q But if there weren't any?

A This is a hell of a damaging thing you are talking about.

EXCERPTS FROM TESTIMONY OF  
WILLIAM J. DOONER [PAGES C.A. APP. 1228, 1256]

WILLIAM J. DOONER, PREVIOUSLY SWORN, RESUMED THE STAND. REDIRECT EXAMINATION BY MR. LEWIS:

Q Mr. Dooner, it is your testimony as I interpret that answer, when the Mayor's voice appeared on the radio all of a sudden it stopped all the digging, all the steel working, it just stopped cold in your tracks?

A Absolutely. We had men arrested even by the City.

Q When he got on the radio and said something about we got too many billboards, all of a sudden everybody quit working?

A Sure. ODI didn't want to come into town. Their men were thrown in jail. Mr. Leo Rolland, the contractor for Holland Outdoors was thrown in jail. Constant harassment every time we would dig a hole by the city coming out, building inspectors red tagging us, put a hold on the board.



EXCERPTS FROM OMNI'S SUMMARY OF EVIDENCE  
OF CONSPIRACY [PAGES C.A. APP. 1343-1348]

. . . .

MR. LEWIS: As to the conspiracy. One, there is testimony in the record about the atmosphere at the meetings they all went to. How it was closed and no real substance but just in a perfunctory type meeting with no real ability to make input.

Two, there is plenty of evidence in the record about how Mayor Finlay was picking on Omni and how he was abusive to them and embarrassing, and harsh and harassing to them.

There is evidence in the record of harassment of the City even after the ordinance was found unconstitutional as to their ability to go forward with the building of the permits.

The mere fact that the permits themselves had been held up and not allowed to be built on by the City because of the moratorium which six months later was found to be unconstitutional, and thereafter the City taking the position that the time had run on the permits and you couldn't build them is a very clear indication of what was in the city's heart, because that is about as abusive of the process as anything you could ever imagine.

There is the fact of the discounted boards which we have gone over.

There is specially an important letter in the file, and I believe it's in December of 1981. — Might be December 1980. It is a letter to Mr. Naegele and it talks about how Mr. Cantey is going to get an ordinance passed and this is very important because under cross-examination and it was in the record through his deposition, I asked, I said,

"Q. No, sir, I asked you when you first got involved with sign ordinances in Columbia, and you told me it was in 1981 or '82. And you're back as far as 1980. You are in here getting an ordinance for your own benefit."

His answer, "You know why I did that. To keep Naegele out."

So we have the fact that indeed there was a plan and a utilization of Columbia Outdoors as far back as 1980 to keep people out of the market through their passages of ordinances.

We have the ordinance itself. I think this is something totally overlooked.

THE COURT: That's the moratorium?

MR. LEWIS: The moratorium and ordinances, yes, sir. You could not have devised a plan more beneficial to COA and more detrimental to Columbia Outdoor (sic) if you had sat down and what we say they did, mapped it out. All you have to do is look at the particular documents and you will see this ordinance is a tailor made ordinance for COA.

THE COURT: Next item of evidence, if you will.

MR. LEWIS: The next item of evidence is the timing. You will find that the timing of this thing was—

THE COURT: Timing of what?

MR. LEWIS: The moratorium. The moratorium is key to the timing because it was March 24. You will find the day before the moratorium Mr. Willis Cantey is over there. You will find through the permits—

THE COURT: Over where?

MR. LEWIS: To see Mr. Finlay. He went to see him the day before the moratorium was passed. You will find their building program was over for the City at that time. They went to a very big building program and ended it at that time. Of course, our inference is he went over to the Mayor to pat him on the back and say we are finished, now pass the ordinance.

THE COURT: Next.

MR. LEWIS: You find memos. There are memos in the file where Mayor Finlay is holding the ordinance up so he can review it and make sure that it is okay. Then in that connection you look at the ordinance itself and every development on the proposed ordinances favored

COA. In other words, some suggestions prior that COA were against and each of the suggestions were changed to do what COA and themselves wanted. You have a history of what the ordinance went through and you will find whatever COA wanted, the ordinance ended up to be as they wished.

THE COURT: Next.

MR. LEWIS: You will find there was an airport conversation where Mr. Cantey said that he would get 1,000 foot spacing and indeed he did get 1,000 foot spacing.

One of the big things you will find in the record, and you will find that Mr. Cantey, prior to the moratorium and during the late 1981 and early 1982, he went all around the country and there were plans given to him by Neagele, by Lamar on how to stop Omni. The plans themselves say get a moratorium and get an ordinance passed fast, right away.

THE COURT: If you will, help me recall the evidence that specifically states this is how you can stop Omni.

MR. LEWIS: The evidence would be a memo dated 11/3/81, a Pensacola trip. Get your own ordinance. 500 foot spacing. Get city ordinance.

There is a memo dated 12/11/81, the conversation with Jerry Marchant.

THE COURT: The conversation between who and Jerry Marchant?

MR. LEWIS: Mr. Willis Cantey. The other one was between Mr. Cantey and someone with Lamar in Pensacola.

THE COURT: Do they mention Omni?

MR. LEWIS: They don't mention Omni. He went down there to find out about Omni and this was what they told him how to stop Omni. In other words, this is what they told him to do to stop Omni from coming into Columbia.

THE COURT: Is that your language, or their language, how to stop Omni? Is this Mr. Lewis' advocacy?

MR. LEWIS: He went down there about Omni. There is no question about that.

THE COURT: Can you quote anybody about saying this is how you can stop Omni?

MR. LEWIS: I can't say that was in the memorandum, but he was down there about what to do with Omni and it is there in those memorandums in speaking about Omni it says get your own ordinance. Get city ordinances.

In the memo dated 12/11/81 in a visit, put in spacing 500 feet now, consider moratorium.

There was a meeting in Spartanburg where he went up to see Naegele about Omni. It says put in sign ordinances as quick as possible, 1,000 feet.

There is a memo of 1/5/82. Another conversation with Jerry Marchant. Put in sign ordinances as quick as possible.

So that we have Mr. Cantey talking to all these people about Omni around the country and going and visiting them. He gets a plan. The plan is clear from these that I just quoted to you. Get a moratorium, put in an ordinance. Indeed that is what happened.

Another important thing is when the moratorium was proposed in March of 1982, Mr. Bates advised council that it was an unconstitutional ordinance.

Mr. Merry was told by Mr. Bates or Mr. Meggs they said they were going ahead anyway and pass it because by the time we got it through court they would have their ordinance passed and it wouldn't make any difference any way.

This shows a state of mind, a protectionist type attitude, when they are advised it is unconstitutional, and indeed that moratorium was found to be unconstitutional.

THE COURT: All right. Next item.

MR. LEWIS: There was, during June of 1982, I believe it was, when the moratorium was in effect and everybody was saying they are all worried about zoning,



—Excuse me, about the proliferation of signs and signs going up. We have City Council voting not only for COA in a permit type situation but they are rezoning property at Allen University purely for the purposes of allowing COA to have a C-3 zoning for purposes of putting up a sign.

We also have contributions in the record of at least \$26,000 and \$15,000, the largest contributions that COA has ever given in their tax returns, to the city of Columbia.

THE COURT: \$26,000?

MR. LEWIS: On one of them and \$15,000 on another tax return, as contributions to the City of Columbia.

THE COURT: Anything else?

MR. LEWIS: I ran down as fast as I could and that is what I come up with right now, your Honor.

\* \* \*

**EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE MATTHEW J. PERRY  
(1/20/86) [PAGES C.A. APP. 1349, 1369]**

\* \* \*

MR. ROBINSON: I will start with Noerr-Pennington. You know what that doctrine is. You are fully familiar with it. What we are talking about here, the only thing that will take it out of that, what we are talking about is an illegal conspiracy. Hostile atmosphere. There is no question but that both County and City Council were upset about billboards jumping up all over everywhere. There is no evidence that COA caused the atmosphere or the atmosphere was the result of any conspiracy. The fact it existed. We don't doubt it existed. They are having to say they were upset. It doesn't indicate a conspiracy.

\* \* \*

MR. MEGGS: Yes, sir, I understand. Our motion relates—It reads as a result of Defendants monopolization, attempted monopolization or conspiracy. I will concede that subject to all these other things we will talk about in the morning, perhaps we are in on the conspiracy to monopolize claim but not the monopolization which can be unilateral activity and not on the attempted monopolization claim.

\* \* \*



**EXCERPTS FROM TESTIMONY OF  
CANTEY HEATH [PAGES C.A. APP. 1388, 1485-1486]**

\* \* \*

A My name is Cantey Heath.

Q Where do you live?

A 1726 Roslyn Drive in Columbia.

Q What is your age, sir?

A Forty-nine.

Q How long have you lived in Columbia?

A Twenty-three years.

Q What is your relationship to Columbia Outdoor Advertising?

A I am president.

\* \* \*

A He didn't get a sign ordinance in 1980 to keep Naegele out.

Q Why?

A He never attempted to.

Q Because Mr. Naegele decided he wasn't coming into town?

A I don't know what Mr. Naegele decided. Mr. Naegele suggested it, too, I think.

Q Do you remember that letter?

A I do.

Q What does that say about an ordinance?

A It says, "I discussed your suggestion with the Mayor about reworking our existing sign ordinance and he promptly said, 'No problem'."

Q What else does it?

A "My son Jim has begun a study to determine exactly what restrictive measures we should request."

Q What kind of measures?

A Restrictive measures.

Q Restrictive measures. There you are in 1980 knowing if you talk to the Mayor you would get restrictive measures, no problem?

A That is what the letter says.

Q Of course you didn't get them at that time. Did you?

A Didn't try.

Q Because Naegele didn't come into town, right?

A He didn't. He never has come.

Q But as soon as Omni came into town, did we get a restrictive ordinance?

A We who?

Q Columbia. Is there a restrictive ordinance?

A The city put in an ordinance.

Q Was it a restrictive one?

A More than it was, but not as bad as it could have been. You could have had 2,000 foot spacing or 1,500. It could have been worse.

\* \* \*

Q But you wanted 1,000?

A I told them I could live with it. I never suggested it.

\* \* \*

EXCERPTS FROM TESTIMONY OF  
JOHN CHILDS CANTEY [PAGE C.A. APP. 1634]

\* \* \*

Q They send you out with free discretion and you don't know how much it takes to make money?

A Yes, sir, pretty much so. I am not concerned with that.

\* \* \*

EXCERPTS FROM TESTIMONY OF  
WILLIAM EDWARD "CHIP" CLARY, JR.  
[PAGES C.A. APP. 1634-1635, 1689-1690]

\* \* \*

Q What is your name, please?

A My full name is William Edward Clary, Jr., my nickname is Chip.

Q Where are you from?

A From Columbia.

\* \* \*

Q Now, what is your connection with Columbia Outdoor, Mr. Clary?

A Well, I was hired as a sales representative in 1967. During that time period I was in sales. I helped or assisted in the leasing. Virtually almost every area of the company to some degree because at that time it was just Cantey Heath and myself that made up the principal work force outside of construction or posting, those areas of the company.

\* \* \*

Q Let's look at a few of them and see where they are. Here is one. Isn't this interesting. You got Plaintiff's Exhibit 88?

A Yes, sir.

Q That is a double billing for your politician friend, Lloyd Hendrix?

A Those one or two particular boards in that particular case I moved Winston somewhere else. That is when you had single member districts for election time. That was a situation where I moved a couple of boards.

Q You put him at Bull and Harden?

A That was in his district.

Q Very important to that politician, right?

A Because of his voters.

Q And you put him right over top of R. J. Reynolds tobacco company?

A Yes, sir, I did, but I moved Winston somewhere else.

Q Where is the letter telling Winston you were going to do that?

A There is no letter, Mr. Lewis, as I explained, I had latitude.

Q Where is that letter and document saying about all this latitude you had?

A I said there is no document. It was a verbal agreement.

. . . .

**EXCERPTS FROM TESTIMONY OF  
JAMES WILLIS CANTEY, JR. [PAGES C.A. APP.  
1715, 1847-1848]**

. . . .

Q Your name, sir?

A James Willis Cantey, Jr.

Q Are you the oldest of the three boys?

A Yes, sir, I am.

Q How long have you been with the company?

. . . .

(Plaintiff's Exhibit 158 received in evidence).

Q Looking at this Exhibit 158. It is a proposed advertising sign ordinance, is that correct?

A Yes, sir.

Q I believe you told me in your deposition that, "I think I made this up as a suggestion to be presented to either the Planning Commission or this committee of Paul Bennett and Patton Adams." Did you?

A Yes, sir, I believe I did. This particular—

. . . .



**EXCERPTS FROM TESTIMONY OF  
T. PATTON ADAMS [PAGES C.A. APP.  
1874-1875, 1924-1925]**

Q You are T. Patton Adams, is that correct?

A I am.

Q Mr. Adams, are you presently on City Council in Columbia?

Q You are familiar in 1978 that National Advertising came into town and started building what you say are signs like this as big as that wall?

A That National came in? I don't know when they came in.

Q 1978, will you accept that?

A If you tell me that is when they came in, I will accept it.

Q And what ordinance with all that hatred for billboards at that time did you have passed? You were on City Council then, weren't you?

A Yes, in 1978. What was your question?

Q What ordinance did you have, with your hatred for billboards, did you have passed when National came in here putting all those signs up?

Q We did not have an ordinance at the time that appropriately addressed the matter.

Q When did you come on?

A I was elected in '76.

Q All the way up—That is six years you didn't do anything about ordinances?

A That's right.

**EXCERPTS FROM TESTIMONY OF  
KIRKMAN FINLAY [PAGES C.A. APP.  
2029, 2056, 2065]**

Q Mr. Finlay, how long have you been Mayor of the City of Columbia?

A Since 1978.

Q Were you on City Council prior to 1978?

A Yes, I was on City Council from July 1, 1974 to July 1, 1978.

Q You have been Mayor continuously since 1978?

A Yes.

Q Mayor Finlay, I believe your counsel asked you about free billboards. You did get free billboards the year you ran for Mayor?

A Excuse me. You said free or three?

Q Free.

A From?

Q Mr. Cantey?

A Yes.

Q I believe you got six free billboards?

A Yes.

Q Now, we were talking about, I believe, you looked at a document in 1979, was that it, when you saw that sign at Millwood?

A Yes. This memorandum of June 1?

Q Yes, sir.

A Yes, sir.

Q You got all concerned about that, I believe, and you wrote a little memo?

A I think that is your characterization of it. I expressed an interest or a concern to the city manager, yes.

Q I think you said you got an awful lot going on, you got too busy to follow up on it?

A Yes. At least I did not follow up on it. Let me say that.

**EXCERPTS FROM TESTIMONY OF  
WILLIAM OUZTS [PAGES C.A. APP. 2154, 2169]**

. . . . .

Q Mr. William Ouzts?

A Yes, sir.

Q Mr. Ouzts, you are presently on City Council in Columbia?

A Yes, sir.

Q How long have you been a member of City Council?

A I am in my 30th year, almost 30.

. . . . .

Q You told me that you just had the permits jerked because there were jungles of signs?

A The phraseology of having permits jerked is not mine. When you tell me that, it is not mine. We enacted an ordinance seeking time to have proper standards as far as billboards are concerned.

Q Proper standards?

A Right.

Q The standards you had prior to that were improper standards?

A It turned out to be.

Q Why?

A Because it seemed to be there were no regulations pertaining to distances, back to back and across the street and things like that. We didn't have those in effect before. It appeared we needed them.

Q Only after Omni came to town?

A No, I won't say that.

Q You didn't need them back when COA, your pal, was here, did you?

A The need for standards would be needed at any time, I would think, proper standards.

. . . . .

**EXCERPTS FROM TESTIMONY OF  
GRAYDON V. OLIVE, JR. [PAGES C.A. APP.  
2176, 2189, 2191-2192]**

Q You are Graydon V. Olive, Jr.?

A That is correct.

Q Mr. Olive, you are the City Manager of the City of Columbia?

. . . . .

A I was here. I wasn't on the job.

Q You weren't on the job at that time?

A Correct.

Q You will agree with me, won't you, it is pretty drastic when an ordinance is passed or reading given that is written on the back of some piece of paper that shuts down an industry in the town, wouldn't you?

A I would say that it is not too unusual. It is not the usual procedure to have an ordinance that is adopted prior to having the City Attorney's office draft it. However, it has been done and can be done on a voice motion.

Q Indeed, it is a drastic step to shut down a particular business operation in the city, isn't it?

A That is a matter of opinion.

Q You don't think that is a drastic step?

A Well, probably is, yes.

Q Sir?

A Yes, it probably is.

Q Of course, you weren't here at that time so you couldn't give them your advice, could you?

A That's right.

. . . . .

Q That is another ordinance that just shuts down the entire city, correct?

A It says, "It shall be unlawful for any person to erect within the city a billboard for off premises commercial advertising."

I don't believe it ever got passed?



- Q At first reading.  
 A That is my recollection.  
 Q Somebody wanted it?  
 A Apparently.  
 Q You don't know who that would be either, do you?  
 A No, I don't.  
 . . .  
 A No, I don't.  
 Q You will agree at the same time Judge Cureton had thrown out the March 24 ordinance, don't you agree?  
 A Yes, I do.  
 Q That was upsetting to somebody, they wanted another ordinance, didn't they?  
 A Yes.  
 Q We don't know who that is?  
 A No, sir.  
 . . .

**EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS  
 BEFORE THE HONORABLE MATTHEW J. PERRY  
 (1/29-30/86) [PAGES C.A. APP. 2350, 2396-2397, 2412,  
 2448-2449, 2456, 2462-2463, 2477-2478]**

. . .

We allege, and the Court—I might mention this. We are responsible for telling you the facts. We are responsible for getting the facts out of the witnesses, putting the facts in as exhibits, that is, Omni. The other sides are responsible for their facts. Judge Perry is responsible for the law. I am going to kind of explain the law. When he says "charges," he is going to charge you for an hour. That means he is going to tell you what the law is for an hour. He is going to tell you what monopoly is. He is going to tell you what conspiracy is. He is going to tell you what constitutes a violation of the Unfair Trade Practices Act. He will tell you the kind of principles you must apply to the facts. So when he charges you, you hear his principles and then you got the facts you remember and you, the jury, are the people that judge the facts, and you apply his principles to the facts and come up with a verdict. It sounds real easy and hopefully it will be.

. . .

What we say in this case is that we were treated unfairly. There is a lot of activity, a lot of hustle and bustle, a lot of inconsistencies which all point to the one fact that Omni Outdoor Advertising was cut out of Columbia as fast as City Council and Willis Cantey could get it done. When they did that, they didn't have to do it with an evil heart, they could have thought it was a great thing for Columbia, but they knew it hurt us and they knew it was anti-competitive and they knew that it was going to shut us out and let us not compete or they should have known it. They were put on notice, and we were hurt to the tune of \$1.8 million. On top of that to contribute to it and add to it and be a part of



it and be an integral part of it, we had Columbia Outdoor Advertising double billing. Taking our clients and double billing.

I ask that you look at these exhibits, that you study them, you think about it, and you will see that logic and common sense puts you to only one conclusion, and that we were unfairly treated, that we were hit with anti-competitive ordinances which they knew or should have known were anti-competitive and that they worked in concert with each other to come up with the ordinance that COA wanted.

So what is the results of all this. First, they didn't prove a conspiracy. The fact they proved a suspicion of one is just not enough. They really ought to be ashamed to tell 13 officials you conspired, you are crooked or whoever it was they charged they can't prove it. They didn't prove any connection whatsoever between their failure to reach their goal of a profitable plant by the end of February with anything the City or COA did.

This case involves a claim by this plaintiff that those five gentlemen set aside the public interest and took up the torch of Columbia Outdoor Advertising. That is what the case is about; corruption. Don't be fooled by the business of well these fellows might have taken this action with the most laudable of motives because that frankly is not the case.

Let's talk for a minute about conspiracy in the context of this case. It is the Plaintiff's burden here to prove by a preponderance of the evidence that a majority, three at least, of the five councilmen who testified before you with specific intent to harm Omni passed the ordinances in conjunction with an agreement with Columbia Outdoor Advertising or its representatives with a specific plan, a common plan to harm Omni. That is what this case is about. I believe that his Honor's charge will conform substantially to that position.

This is a case of government corruption. No matter how you slice it. The government doesn't function in a vacuum. . . .

The complaint here is this conspiracy got going a long time ago, a long time prior to March 1982. I submit to you there is no way that March ordinance was the result of any kind of conspiracy or agreement. . . .

Now, common sense tells me, and I submit would tell you, that if the City Council way back in 1981 or even March of 1982 came to this common plea plan, agreed on this scheme to enact ordinances, to illegally keep Omni out of the city, with the specific intent to accomplish that objective, I submit to you that this meat grinder process would have never taken place.

THE COURT: All right. Let's see, I guess I will handle the discussion on the new submissions after the next argument. However, for purposes of the verdict, I am sure you will have enough time Ms. Powell, but I need to get as much out of the way as I can. There is no objection to the verdict. However, use our language.

For your information, I am submitting two interrogatories to the jury. These are perceived necessary because as to counts one and two, the Court needs the guidance of the jury. Therefore, an interrogatory as to count one would be as follows: Do you find from a preponderance of the evidence that the Defendants, Columbia Outdoor Advertising Company and the City of Columbia, conspired in restraint of trade against the Plaintiff Omni Outdoor Advertising Company, with a yes or no.

You will note I have not outlined the various courses of conduct. I just put that one there. You see, if the answer to that question was no, then quite obviously there will be a dispute among you on whether any re-

sulting verdict for the Plaintiff against COA would be maintainable. I won't even talk about that now, but I see that lurking in the background. In any event, I need the guidance of the jury on that question.

A similar question, worded similarly with reference to whether Columbia Outdoor Advertising Company and the City of Columbia conspired to monopolize the outdoor advertising market. I think I indicated yesterday, concluded that the relevant market, whether we call it a market or a submarket is outdoor advertising. Of course, I am calling it Richland and Lexington Counties. Does everyone agree the geographic area is clearly stated?

MR. LEWIS: Yes, sir.

THE COURT: I am going to submit these interrogatories in addition to the verdict options. The answers to these questions would serve important guidance to the Court. Do you have any question, Ms. Powell?

. . . .

**EXCERPTS FROM OMNI'S CLOSING ARGUMENT  
TO THE JURY [PAGES C.A. APP. 2480, 2482]**

. . . .

Well, because we had an agreement. We had cooperation. We had the City and Columbia Outdoor wanting the same thing. Mr. Meggs says it has to be corrupt. You will hear his Honor charge it doesn't have to be a bad motive. It doesn't have to mean that you think you are doing wrong. What it means is that there is agreement between the City and Columbia Outdoor that they limit the number of signs. That is all you have to find, that they worked together to limit the signs.

If the purpose is because they think its great, that doesn't matter. The point is that they tried to limit the signs. Once they tried to limit the signs, they violated the antitrust laws, period. They agree the purpose of everything here is to limit the signs, they violate the anti-trust laws and it is illegal. It doesn't matter how good a heart they have.

. . . .

You can't go out on the corner and yell out cuss words. You can't go out on the corner and incite riots. You can't go to your legislator and you can't sit down with him and you can't ask him to pass a personal bill purely for your own protection. You can't go to the city and ask that. You can't go to City Council and say I want this anti-competitive bill because it is going to help me. I want to close it down. You can't ask for illegal things, and they did. Everybody says I want my street fixed. I want this road paved. I want lower taxes. Those are fine, but you don't go and ask people to pass an ordinance to protect you.

. . . .



**EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE MATTHEW J. PERRY  
(1/20/86) [PAGES 2486, 2494-2496]**

. . . . .  
No, I think this case is a real good example of, yes, political favors, of coming in there and seeing and making sure there was an ordinance, and knowing or should have known it was anti-competitive and passing it anyway, which is a violation, which is wrong.

. . . . .  
Yes, they had an honest employee in their business. They had someone in the business who told what happened and they wrote it on the sheets and they are right here for you. I want you to read them. This goes with Exhibit 86. It is part of Exhibit 165. It is the chart sheet for the double billing shown on 86. The double billing. I want you to look at it. The double billing that it shows was W N O K was pasted over Newport. Newport was supposed to have this location in April. There is the word written right there. Snitched. Snitched. You look at it. Snitched. Not moved, not changed, snitched. You look at them. They are in here. There is a bunch of them. Some employee in that company knew what was going on and you notice they didn't bring any of them in here. Snitched. Not only did they snitch from the cigarette companies, they snitched from Omni. Leaf through it, look at it. Those snitchers, they conspired.

Omni came in here and sure they came in here and they expected to make a profit, but they didn't make a profit they made a loss, an out of pocket real dollar loss of \$777,000. That is no shelter, that is no nothing, that is Mr. Dooner out of the pocket, because they snitched and conspired.

They devalued his plant. Who is going to pay a good price for a plant that loses money and has 41 percent occupancy? Nobody. So he lost \$782,000 for \$1,559,000.

Mr. McDonald comes in here and you know the only thing he complained about? Profit. He said the profits he was going to get were too high. Take them away if you believe that. He didn't complain about the \$1,559,000.

Conspiring and snitching. That is what I want you to look at. Look at the book. Snitched. They got caught by their own people.

— You heard a lot of this testimony. You got the evidence. We too appreciate it. You have had the patience to put up with us, to listen to me, to stand here and go through what—I told you I wish we were going to be a Perry Mason, but we weren't. We do appreciate it.

The time comes now for me to sit down, but as I do I want to ask you to do one thing. You are going to go in the jury room and you are going to look through all these facts. I want you to remember the snitch, the conspiracy. Also you are to return a verdict, and I ask you to return that verdict in favor of the Plaintiff.

Do you know what the word verdict comes from? It comes from the Latin word "vere dictum". It means to speak the truth. That is what we ask of you. Speak the truth. Tell the snitchers and the conspirators they can't do that, and return us a verdict. Thank you.

. . . . .



**INSTRUCTIONS TO THE JURY**  
**[PAGES C.A. APP. 2497(2)-2497(82)]**

**CHARGE TO THE JURY BY THE**  
**HONORABLE MATTHEW J. PERRY**

**THE COURT:** Mr. Foreman, ladies and gentlemen of the jury, now that you have heard all the evidence and the arguments of the attorneys, it becomes my duty to give you the instructions of the Court concerning the law that is applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you and to apply that law to the facts as you shall find them to be from the evidence that has been presented. You are not to single out any one instruction alone as stating the law, but you must consider these instructions as a whole.

Now, of course, the instructions will be compartmentalized and, of course, I will give you separate instructions as to each of the three separately stated causes of action that will be submitted to you, but you consider all of the instructions. When I am talking about separate things, consider all of the instructions as they relate to that particular subject matter.

Neither are you to be concerned with the wisdom of any rule of law that I shall state to you. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that which is now being given you in these instructions, just as it would be a violation of your sworn duty to base a verdict upon anything other than the evidence that has been presented.

I have each day, and I suppose I began sounding like a broken record, admonished you not to speak with anyone about the case, not to permit anyone to talk to you about it. I have from time to time reminded you that you should base your verdict solely upon the evidence that is produced in court.

In deciding the facts of this case, you must not be swayed by any bias or prejudice for or against any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated to you by the Court and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community holding the same or similar stations in life. Of course, all of the parties to this case are entities. There are two corporate entities and there is a governmental entity. So there are no individual defendants in this case.

A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons including corporations stand equal before the law, and are to be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through natural persons as its agents or employees. I have said that with reference to the corporate parties. Now, remember we also have a governmental entity. You consider this instruction as it applies to governmental entities also. In general any agent or employee of the corporation may bind the corporation by his or her acts and declarations made while acting within the scope of that person's authority delegated to that person by the corporation, or within the scope of that person's duties as an employee or agent.

Now, I stated earlier it is your duty to determine the facts. In so doing you must consider only the evidence I have admitted in the case. The term "evidence" included the sworn testimony of the witnesses and the exhibits admitted in the record.

Well, it might also include, it does in fact also include—I don't know there are any stipulations in this case. You will note this has been a very hard fought case.

The parties have been very contentious, but if there are any stipulations of fact, why that, too, would be evidence. Of course, evidence would be things concerning which the Court takes judicial cognizance.

Now, remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case. In so doing to call your attention to certain facts or inferences that might otherwise escape your notice.

I mentioned to you at the outset that the lawyers are advocates for the client they represent. I mentioned that you would see excellent lawyers operating in this case. By now, I hope that you will agree with me that they are all very fine lawyers. Lawyers are obligated to represent the interests of their clients respectively. To do so with vigor, with loyalty and fidelity to their clients and the interests of their clients. The lawyers in this case have done that.

When lawyers vigorously represent the interests of their clients they sometimes cross each other, and speak seemingly in discourteous fashion to each other. I don't think there has been too much of that. There has been some rather testy moments, but they have, of course, acted in the finest tradition of members of the legal profession in this case.

Now, do not hold against them or their clients the fact that lawyers have found it necessary to speak out from time to time. That is their duty, they are obligated to act in that fashion. Should any of you ever have the occasion to find yourselves in a courtroom, I know that each of you would want a lawyer who would be loyal to you and he who would vigorously represent your interests as and when the occasion required. So do not hold anything against them or their clients if they have from time to time seemed a little testy about some question or the other.

Do not take any guidance from the manner in which I responded from the rulings I made when they spoke out. I was at the moment only fulfilling one of the roles, one of the many roles that is mine as the presiding Judge in this case, ruling upon the admissibility of a given item of evidence at that particular time. That had nothing to do and should not be considered by you as an attitude on my part as to who is right and who is wrong in this case.

Now, in the final analysis it is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you, so while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of your common experiences.

In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been presented.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept as true and accurate all of the evidence. You are the sole judges of the credibility or believability of each witness and the weight to be given the testimony of that witness.

Now, in weighing the testimony of a witness, you should consider that witness' relationship to the Plaintiff or to the Defendants; the interest, if any, of the witness in the outcome of the case; the manner of the witness while testifying; his or her opportunity to observe or to have acquired knowledge concerning the facts about which he or she has testified; the candor, truthfulness, fairness, intelligence of the witness; the extent to which he or she has been supported or contradicted by other credible evidence. You may in short accept or reject the testimony of any witness in whole or in part.

Now, you just wouldn't reject out of hand everything a witness said unless, of course, there appears to be some



reason existing from the other evidence that has been presented for you to so do it.

Now, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or impeached by a contradictory evidence, by a showing that he or she has testified falsely concerning some material matter, or by evidence that at some other time, some time other than that, than the time the witness is testifying in court, the witness has said or done something or has failed to say or do something which is inconsistent with that witness' in court testimony. If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

Now, in this case the lawyers have already told you what the contentions are. Some of the issues that existed and that were originally in the case are no longer there. There are three counts in the complaint left. I am not going to read them out to you. I am only going to refer to them. The lawyers have already spent a lot of time telling you about them. I would not really accomplish anything by reiterating them, but I mention them now as a prelude to the instructions I am going to give you as they relate to each of these matters.

In its first count, the Plaintiff alleges that the Defendants, Columbia Outdoor Advertising Company and City of Columbia, have violated the antitrust laws and they have conspired to restrain trade. They have conspired against this Plaintiff to restrain trade in several respects. Now, I am going to stop right there. That is the one dealing with conspiracy to restrain trade. As I have said, the lawyers have already told you what their essential allegations are in that regard.

You know that the Plaintiff alleges that the Defendants conspired to keep the Plaintiff out of the relevant market with respect to outdoor advertising, the outdoor advertising business, or to limit the extent of this Plaintiff's participation therein.

Secondly, the Plaintiff alleges that these Defendants, Columbia Outdoor Advertising Company and the City of Columbia conspired to monopolize the outdoor advertising business, conspired against this plaintiff.

Also it is alleged, and this further allegation is solely against Columbia Outdoor Advertising, that Columbia Outdoor Advertising monopolized and attempted to monopolize the outdoor advertising business in the relevant market. That is to say, monopolized and attempted to monopolize in a fashion that damaged this plaintiff.

Then, of course this plaintiff alleges that, and this count applies only to Columbia Outdoor Advertising Company, that Columbia Outdoor Advertising Company committed an unfair trade practice, or one or more unfair trade practices against this plaintiff thereby causing damage to this Plaintiff.

Now, I have said that in capsule fashion. I have summarized down to the bare minimum. I have not given you all of the wherein before and the herein and wherefore, and I have not given you the many, many pages of allegations that the parties have given. They have summarized those for you. I have only introduced you to the subject.

The Defendants, of course, have given their responses. Columbia Outdoor Advertising denies that it has conspired against the plaintiff. It denies that it has monopolized, and, of course, it denies it has engaged in an unfair trade practice.

It says further that with respect to any act committed by any person associated with the city—correction.

That with respect to any act committed by any person associated with this Defendant in an effort at per-



suading the pasage of ordinances or legislation, that this was activity that they have a perfectly legal right to pursue, and that, act of course, does not constitute evidence of a conspiracy.

City of Columbia likewise denies that it has conspired. It denies that it has conspired either to restrain trade or that it has conspired to monopolize.

Now, the city is not a part of the Unfair Trade Practices Act allegation. I don't know whether I said it a moment ago, but the Defendant, Columbia Outdoor Advertising, denies it committed an unfair trade practice against this plaintiff.

Of course, the parties have said a lot of other things in their pleadings, and, of course, they make numerous allegations in support. The Plaintiff makes numerous allegations in support of its claim that the Defendants conspired, that the Defendant, Columbia Outdoor Advertising, monopolized or attempted to monopolize, that the Defendant, Columbia Outdoor Advertising, committed unfair trade practices. They make lots of allegations. You have heard all of those summarized for you by the Plaintiff's attorneys.

The Defendants make a number of assertions in support of their contentions that they did none of these things. You have heard their various explanations summarized for you. I will not go further into them.

Now, the burden is on the Plaintiff in a civil action, such as this one, and that is what this is. This is a civil case. I think I have told you that. You know that. It is a civil action. An action, to say, between private parties as opposed to a criminal case. So in a civil action such as this the burden is on the Plaintiff to prove the essential elements of that party's claim by the preponderance of the evidence.

A preponderance of the evidence means such evidence as when considered and compared with that opposed to it has more convincing force and produces in your minds a

belief that what is sought to be proved is more likely true than not true.

In other words, to establish a claim by the preponderance of the evidence merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses regardless of who may have called them and all the exhibits received in evidence regardless who may have produced them. If the proof should fail to establish any essential element of the Plaintiff's claim by a preponderance of the evidence, the jury should find for the Defendant as to that claim.

Now, of course, where more than one claim is made, as is the case here, you consider all of the evidence as it relates to each claim separately.

You will, I hope, give separate consideration to each of the three separately stated claims.

Consider all of the evidence as it relates to that claim and consider that evidence no matter where it came from. No matter who produced it. If the preponderance of the evidence does not support each essential element of a claim, then the jury should find against the party having the burden of proof as to that claim.

Now, I am going to go into some instructions as they relate to each of the causes of action. I mentioned to you that the first two causes of action arise under the Federal law entitled 15 United States Code Section 1.

It is provided that every contract combination in the form of a trust or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations is declared illegal. Of course, that is what the statutory law provides in that regard. Policy of that law is that competition and interstate trade and commerce should be free from unlawful conspiracies, combinations or agreements in restraint of such commerce and trade.

The idea is to preserve and advance our system of free competitive enterprise. To encourage free and open competition in the market place to the fullest extent practicable all to the end that the consuming public might be able to receive better goods and services at lower prices.

It is not the purpose of the antitrust laws to inhibit the legitimate conduct of business operations, to force every type of business into a common mold or to render illegal the ordinary contracts or combinations of businessmen or firms in the usual devices to which they resort to promote the success of their businesses, so long as these combinations and devices do not necessarily have a direct substantial and unreasonably restricting effect on competition and interstate commerce, as the term or phrase will immediately reveal. We are talking about conduct across state lines.

It should be emphasized that it is the purpose of the antitrust laws to promote competition by encouraging businesses to compete with one another. This competition is frequently vigorous. Such hard competition is not a violation of the antitrust laws. Indeed it is what the antitrust laws seek to accomplish.

The law recognizes that in the normal competitive process some competitors are going to lose sales, and others are going to gain sales sometimes at the expense of another. In fact vigorous competition may actually cause some to go out of business. This is the normal competitive gamble. No competitor is protected from the effect of lawful competition whatever the effect may be.

Another thing that the antitrust laws do not do is to prohibit every kind of practice which someone may think is evil or unfair. Rather they are concerned solely with those particularly practices which tend to cause a breakdown of the competitive system and to produce monopoly.

There are many kinds of unquestionably wrongful conduct which, nevertheless, are not prohibited by the antitrust laws, because however bad they may seem, they do

not have this type of specific tendency to suppress competition, and thus raise prices to the consumer.

A conspiracy is a combination of two or more persons to accomplish by concerted actions some unlawful purpose, or to accomplish a lawful purpose by unlawful means.

That term "conspiracy" sometimes mystifies the listener. The explanation that one gives as to what it is sometimes doesn't give much help. Let me see if I can't do a little bit better job.

A conspiracy is an agreement between two or more persons to violate the law. How does that sound? That is a little bit better. Or to do something otherwise lawful in an unlawful manner. Let's see if I can try it another way.

A conspiracy is concerted action between or by two or more persons, that is to say, where two or more persons acting together towards a common goal, that goal being the violation of the law, or by concert they act unlawfully to accomplish an unlawful result.

All right, I am going to move forward in the hope you got some idea now what a conspiracy is. If one or more such person's knowing—Let me start that sentence again.

And if one or more such persons knowingly does any act to effect the object or objects of the conspiracy, that person becomes a participant therein or a member of the conspiracy.

The evidence need not show the members entered into any express or formal agreement, or that they directly by words spoken or in writing stated specifically between themselves what their object or purpose was to be, or the details or the means by which the object or purpose was to be achieved.

For the most part, people rarely reduce agreements to violate the law to writing. Normally, such agreements come into being out of the public view. So it would be unusual if there were any formal agreement for the simple reason that conspirators do not normally put their



understandings or agreements in writing, nor do they make their plans public in the usual course of events.

Conspiracies involving elaborate arrangements are generally not born full grown, rather they mature by successive stages which are necessary to bring in the essential parties, and not all of those joining at the early stages make known their participation to others who later come in. It is, therefore, sufficient to show the essential nature of the plan and the conspirators connections with it without requiring evidence or knowledge of all of its details or of the participation of others.

Now, in this regard—Is someone experiencing a problem? Is everybody all right? All right. Remember then, remember what I told you. Any time you need a moment, just let me know. I know it is not easy to listen to non-stop oratory. I have been going now for just over 35 minutes. I know how some people feel on Sunday morning when the Minister goes too long.

Participation in a conspiracy need not be proved by direct evidence. By the way, you will recall, or did I ever tell you? If I did not tell you before, let me tell you now.

There are two types of evidence a jury can consider. One is direct evidence which normally comes through the testimony of an eyewitness or someone who has direct knowledge concerning the existence of a fact. The other is by circumstantial evidence.

Circumstantial evidence does not come by way that of an eyewitness but it comes by proof of a series of circumstances all of which when linked together point to the existence or nonexistence of a certain fact.

So a conspiracy may be proved either by direct evidence, and that is the one, you know, we said that, of course, it could be proved if somebody were to write it down in a written agreement, but most people don't do that, or it could be proved by circumstantial evidence, by the proof of the existence of a series of facts, none of which standing alone would establish the fact, but all of

which linked together point to the existence of or the nonexistence of a fact.

A common purpose and plan may be inferred from a development and putting together of circumstances, and the conspiracy may be shown by circumstantial evidence or permissible inferences from the facts.

So in order to prove the existence of a conspiracy, a party need not show you an express formal agreement to do so. You are allowed to infer the existence of a conspiracy from the course of dealings or through an exchange of words and acts. A conspiracy need not be proved by direct testimony or other direct evidence. Therefore, the law allows you as members of the jury to infer the existence of a conspiracy from things actually done, taking into consideration all of the facts and circumstances surrounding the conduct of the parties who are charged with the conspiracy.

Proof of conspiracy, however, requires more than mere suspicion or conjecture, and there must be either direct proof of a conspiracy or circumstantial evidence sufficiently strong to establish its existence. It is sufficient, however, if it is established by the preponderance of the evidence or the greater weight of the evidence that two or more parties in any manner came to an understanding to establish a common and unlawful design.

It is not necessary that each member should know the exact part which the other member was to play in the conspiracy. It is enough that a defendant be proved to have been a member of the conspiracy, be shown to have knowledge that the party who he was assisting was engaged in a common and unlawful plan. Such knowledge may be inferred from a Defendant's conduct and attendant circumstances where the acts proved are of a nature to satisfy you that a defendant was aware of the fact that the party with whom it was acting was engaged in the unlawful activities charged.

Where two persons actuated by the common purpose of accomplishing an unlawful act purposely working to-



gether in furtherance of the unlawful scheme, each of such person's becomes a principal in the conspiracy, although the part one of them may take therein is a small or subordinate one or is to be done separately or at a distance from the others.

Now, you will note that not every act in restraint of trade is illegal under the statute that I have read. By the way, that statute is popularly known as the Sherman Antitrust Act.

So not every act in restraint of trade is illegal under the Sherman Act, but only when it is a result of a combination contract or conspiracy. These words, of course mean practically the same thing.

A conspiracy then once again is a combination or agreement between two or more persons to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means.

A conspiracy is a kind of partnership in which each member becomes the agent of the other member. There can be no conspiracy unless more than one person is involved. For our purposes, a corporation is a person and a municipality is a person. So that the term person here means entity in its broad sense, just as it would apply to an individual, so, too, it means corporations and governmental entities.

The very word "conspiracy" means together with someone else.

I sometimes have remarked in response to arguments of the attorneys in your absence that in the law of conspiracy it takes two to tango. It takes two or more to conspire.

A person couldn't conspire with himself or herself. A corporation cannot conspire with itself. A municipality cannot conspire with itself.

If its conduct is said to be conspiratorial at all, it must be along with someone else in accordance with the definitions that I have earlier given you.

In this regard, a corporation and its officers and employees are considered by the law to be only one person, thus you cannot find that an agreement between two or more offices or employees of a corporation is a conspiracy unless at least one other person who was not an officer or employee of that corporation was also a party to the agreement.

As I said a moment ago, a conspiracy requires at least two independent parties, and a defendant cannot be said to have conspired if indeed its conduct was only by itself or in the case of a corporation within its corporate family.

Before you can find that the City of Columbia and Columbia Advertising Company formed a conspiracy as complained of by the Plaintiff, you must find by a preponderance of the evidence first that the conspiracy, that a conspiracy was knowingly formed.

Second, that these Defendants knowingly participated in a common and unlawful plan with the intent to materially aid or further some object or purpose of the conspiracy. It is not enough that the evidence may raise a mere suspicion.

Remember now you cannot find for a party if its evidence raises only a suspicion. You cannot in the final analysis base a verdict on suspicion, conjecture or surmise.

Now, to act or participate knowingly means to act or participate voluntarily or intentionally, and not inadvertently or by mistake, accident or some other lawful reason, innocent reason.

So if a defendant or other person with understanding of the unlawful character of a plan intentionally encourages, advises or assists by any act or by any manner whatsoever for the purpose of furthering the unlawful scheme, he thereby becomes a knowing participant, a conspirator.

A person who has no knowledge of a conspiracy but who happens to act in a way which furthers some ob-

ject or purpose of the conspiracy, does not by such act become a conspirator.

In determining whether or not a defendant or other person was a member of a conspiracy, the jury is not to consider what others may have said or done. That is to say, the membership of a defendant or any other person in a conspiracy must be established by evidence in the case as to that party's own conduct by what that party itself knowingly said or did.

Unless you find by a preponderance of the evidence that every person understood from something said or done by the others that he was committed to the plan, there can be no conspiracy and, therefore, no violation of section 1 of the Sherman Act.

Coming along now. I have been talking 50 minutes. I got a lot further to go, but I will let you know where I am in about ten minutes.

Now, the Plaintiff must do more than present a fact situation, in order to recover, which may suggest the existence of an agreement, the Plaintiff must present facts which cannot be explained away as innocent conduct. If the evidence as a whole can be understood as innocent, or as nonconspiratorial behavior, even if it is also consistent with a conspiracy, then the Plaintiff has not proved a conspiracy.

Now, the only restraint of trade prohibited by antitrust laws is an unreasonable restraint of trade. The law recognizes that it may be impossible to conduct a business without in some degree restraining trade. The antitrust laws were enacted for the protection of competition and not for the protection of competing businesses.

Therefore, the Plaintiff must establish that the Defendant's acts injured not only the Plaintiff, but competition in the advertising market within Richland and Lexington Counties, the outdoor advertising market.

Therefore, in determining whether a restraint in trade exists, you must decide whether the conduct which a

party contends to be in violation or to be in restraint of trade was—I have ruined that sentence. Let me start it again. Maybe I am getting tired.

Therefore, in determining whether a restraint of trade exists, you must decide whether the conduct which is found tends to restrict or otherwise control free and open competition in the particular business involved. In determining whether or not such an reasonable restraint exists, you need not find a specific public injury, but you must find that the conduct tends or is reasonably calculated to prejudice the public interest of free and open competition.

Now, while you will make your determination from consideration of all the evidence in the case, including the effect on the outdoor advertising industry, and the economic effects upon competition.

Now, in determining whether or not a particular restraint is reasonable or unreasonable so that it is a violation of the antitrust laws, you may consider the following factors;

First, the nature of the particular industry involved.

Second, facts which are peculiar to the particular industry involved.

Third, the nature of the restraint and its affect actual and probable.

Fourth, the reasons for adopting the particular practice which is alleged to be a restraint.

Now, in determining whether the City of Columbia was a member of a conspiracy, if any, with Columbia Outdoor Advertising Company, as charged, you must not consider what others unconnected with the City of Columbia may have said or done.

The City of Columbia's involvement in the alleged conspiracy must be established, if at all, by the evidence in the case as to its own conduct, that is to say, its own acts and statements.

The City of Columbia is recognized as a corporation under our laws. A city in South Carolina can act only



by way of its elected governmental body, its City Council, its Mayor.

The City of Columbia operates under the council manager form of government. Under this form, the Mayor has no more legal authority than the other members of City Council.

The local laws of the City of Columbia such as those involved in this lawsuit, are enacted by ordinance of the City Council. In order to enact an ordinance a majority of City Council, including the Mayor, must vote in favor of the measure.

During 1982 the Columbia City Council consisted of five persons, its Mayor and four members of its City Council. Since that time it has enlarged. There are more of them now.

I previously told you that in order to enact an ordinance a majority of the City Council must vote in favor of that measure.

Now, with regard to conduct before a City Council, a public official or any governmental body or governmental official, I remind you that some of the parties contend that any conversations with governmental officials, any lobbying for the passage of legislation that occurred in this case was protected activity.

The Constitution ensures the right of all persons, whether acting individually or in concert to petition government for political action. Recognizing that persons in the exercise of these Constitutional rights naturally will petition government for political action that is favorable to their particular interests, and unfavorable to the interests of others. The Supreme Court has declared that this right to petition government for political action is paramount, and that the concerted effort of various parties genuinely to influence public officials does not in any way violate the antitrust laws regardless of intent or purpose. Joint efforts truly intended to influence public officials to take official action do not violate antitrust laws, even though the efforts are intended to eliminate

competition, unless one or more and listen to this carefully, they do not violate the antitrust laws unless one or more of the public officials involved was also a participant in the alleged illegal arrangement or conspiracy.

Let me put it another way. It is perfectly lawful for any and all persons to petition their government, but they may not do so as a part or as the object of a conspiracy. Remember, a conspiracy being an agreement between two or more persons to violate the law, or to accomplish an otherwise lawful result in an unlawful manner.

Now, I got a lot more to say to you about that exception, but I doubt even if I talked the balance of the day I would say anymore than I already said about the right of the citizen to petition his government. That is a right that is in the Constitution. That is a pretty easy one for all of us to understand because we are members of the voting public.

I have been talking one hour and looking at how far I got to go I cannot promise you that I will take less than another hour, but I will try and come in in less than another hour. I may talk no more than another 40, 45 minutes. Don't hold me to that. It may go to 50 minutes or it may go to an additional hour. Do you want a little break now?

THE FOREMAN: Let's go.

THE COURT: All right, we will keep going. Do you want to stand up and stretch your legs?

(The jurors stand up and stretch).

THE COURT: I apologize for the length of the discussions. I told you the other day I wouldn't be filibustering. I hope you agree. I am not filibustering. Everything I say is important to this case.

I instruct you that a citizen's communication with a public official even if that official thereby is influenced to favor the constituent is part of the legislative process and cannot violate the antitrust laws.

So the Constitution and laws of our country protect the rights, rights of the people to petition or lobby their government officials for favorable political actions.

We may assume that persons seeking political action do so to further their own interests. There is nothing illegal about this even when one seeks action which is intended by that person to be in that person's own advantage.

This protection of the citizen fails, however, when one or more of the public officials joins in an illegal agreement or conspiracy with the person seeking the political action.

Now, I have given you earlier the burdens of proof. The burden is on the Plaintiff to prove the existence of a conspiracy and the participation by these Defendants in that conspiracy.

If this were a criminal case, I would tell you that a defendant is presumed to be innocent, and that the burden is on the Government to prove that person's guilt by proof sufficient to convince the jury beyond a reasonable doubt of that person's guilt.

The presumption of innocence also prevails in civil cases, but in a civil case it may be removed not by the standard that is necessary in a criminal case, that being the standard of proof beyond a reasonable doubt, but may be removed by the standard that prevails in civil cases, that being the preponderance of the evidence.

I may be making the Court parties angry. I am skipping over some because when I see something I already said to you, I am not going to say it again. I think we are doing pretty good so far.

I think it boils itself down to this. I am talking about that circumstance under which the governmental exception applies, that is to say, where a party petitions his governmental officials to do something, and the exception that provides that that conduct does not violate the anti-trust law, that is an exception that is recognized in the antitrust laws.

So if by the evidence you find that that person involved in this case procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of the Plaintiff to the marketing area involved in this case, that is to say, Richland and Lexington Counties, and thereby conspired, then, of course, their conduct would not be excused under the antitrust laws.

So once again an entity may engage in a legitimate lobbying committee to procure legislative even if the motive behind the lobbying is anti competitive.

If you find Defendants conspired together with the intent to foreclose the Plaintiff from meaningful access to a legitimate decision making process with regard to the ordinances in question, then your verdict would be for the Plaintiff on that issue.

In that second cause of action the Plaintiff, you will recall I told you, accuses the Defendants of monopolizing, attempting to monopolize and conspiring to monopolize.

Two of these concepts apply to one of the Defendants, Columbia Outdoor Advertising. So the Plaintiff contends that Columbia Outdoor Advertising Company monopolized the market or attempted to monopolize the market.

The Plaintiff says with respect to the two Defendants, that they conspired together to monopolize the market. This account in the complaint comes under section 2 of the Sherman Act. I have read to you section 1 already in connection with count one of the complaint.

Section 2, which is set forth in 15 United States Code Section 2 provides that every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations shall have violated the provisions of anti-trust laws. That is not a direct quote. I omitted something that did not apply and I simply stated for you that that is a violation of the law.



So we have the words "monopolizing" and "conspiring" and attempted to monopolize interstate trade and commerce. These charge a violation of section 2 of the Sherman Act act.

The word "monopolize" means the power either to obtain or maintain the power to remove or exclude competitors from a certain field of competition in a particular business or industry. The specific evidence bearing—Let me see now. I am going to leave out some of this.

I think I can approach this one in a better way than I was about to do so. Let me shift gears and give you another approach to it. Well, I am going to read you a part of it anyway.

An important factor in considering the question whether a party has monopolized is the share of a particular product market which is held by the Defendant.

The law says that when one company has more than 60 or 70 percent of a given market, the amount isn't precise, that company may well have monopoly power. However, a 60 or 70 percent share is not so high that it necessarily proves the existence of monopoly power. Therefore, other factors which we will describe to you shortly must also be considered to determine whether a company with such a market share actually has monopoly power.

If a company approaches a higher percentage of the particular market, this becomes strong evidence that the company possesses monopoly power, while a company with significantly less than 60 percent share of the market is extremely unlikely to possess monopoly power. In the range between 70 to 90 percent market share, the market share becomes a stronger indication of monopoly power as the share increases.

Another factor to take into account is the number and size of the competitors within the market before a complaining party such as the Plaintiff here enters that market.

If these are proven to be weak and small so that they do not offer substantial competition to the party claiming to possess the monopoly power, this would tend to suggest that the party alleged to have monopolized indeed does have monopoly power.

On the other hand, that party, the party allegedly possessing the monopoly, that party's competitors before the plaintiff entered the picture have been shown, if they have been shown to be strong and vigorously competitive, you should take that into account as tending to support the conclusion that the Defendant party does not have monopoly power.

In addition you should consider whether the markets involved are becoming more or less competitive. Are other companies entering the particular market? Is the number of competitors declining? Increasing competition may suggest the absence of monopoly power, while decreasing competition might suggest that monopoly power exists.

We are to consider what monopoly means under the Sherman Act, which is not the same thing as its usage in loose or popular speech.

Large size alone is not monopoly, or monopoly power. At the same time, however, the size of a company, whether in absolute terms or in comparison to the competition it faces, is one factor you can consider among others in determining whether it has monopoly power.

Whatever it would mean literally from its Greek derivation, monopoly does not mean total control of the market, or total absence of competitors.

In most cases where there is an issue worth consideration, and in this particular case the alleged monopolist has at least some competition in the relevant market. Whether the Defendant should be found to have monopoly power within the meaning of the law depends on the relative strength or weakness of the Defendant measured against the relative strength or weakness of its com-

petitors. This, as you will see, involves a careful analysis of a number of factors.

So here the Plaintiff alleges that the Defendants have violated Federal antitrust laws by monopolizing and conspiring and attempting to monopolize interstate trade or commerce in the outdoor advertising industry.

The term "monopolized" as used in the Federal antitrust laws means the power either to obtain or to maintain, the power to remove or exclude competitors from the field of competition in a particular business or industry.

In this case the Defendants have monopolized—Let me start again.

Remember now only one of the Defendants can be found to have monopolized or to have attempted to monopolize. However, with respect to the concept that the two of them conspired to monopolize, then, of course, both may, if the evidence convinces you by the preponderance thereof, may be deemed to have conspired to monopolize.

So in this case a Defendant may be shown to have monopolized within the meaning of the antitrust laws if it appears from a preponderance of the evidence that;

One, on the question of conspiracy, that the two of them have knowingly combined or conspired either to obtain or to maintain the power either to remove or to exclude or keep out competitors from the field of competition, in this case particularly as it relates to this Plaintiff.

Two, that they possess the necessary power to remove or exclude.

Three, that they have the intent to exercise their power to remove or exclude.

Of course, if the power to remove or exclude competitors has been exercised, and if as a result of the exercise of such power one or more competitors, in this case this Plaintiff, have been removed or excluded, some actual monopolization has already occurred.

So to find that monopolization has occurred you have got to find that actually the elements that I have given you have actually come about. Remember now, you got to find that from the preponderance of the evidence. This finding could only be made against the Defendant, Columbia Outdoor Advertising.

On the other hand, if it actually hasn't come about but has been planned or conspired among two or more people to have come about, then, of course, you may turn your attention to both Defendants and see whether the evidence convinces you by the preponderance thereof that both of them come within this category.

So monopolization may be found to exist whenever it appears from a preponderance of the evidence in the case that the three essential facts or conditions just stated have in fact occurred.

Now, to attempt to monopolize the cause of action as it relates to the allegation that a party has attempted to monopolize, and this statement applies to the Plaintiff's allegations against Columbia Outdoor Advertising, has two essential elements.

One, a specific intent to monopolize.

Two, some act or acts done in furtherance of an attempt to monopolize, which although insufficient to actually produce monopoly power, creates a dangerous probability that monopolization will occur. Note, I said "probability." I did not say suspicion or possibility. It has to go a little further and say probability.

In order to find an attempt to monopolize both elements, the intent and the act or acts must appear and act together, and together they must result in a dangerous probability that the Defendant will achieve a monopoly of the relevant market.

It is not necessary, however, in order to constitute an attempt to monopolize that the Defendant's actions actually succeed in achieving or maintaining monopoly power.



With reference to the offense of conspiracy to monopolize, it is necessary for the Plaintiff to prove by a preponderance of the evidence that;

One, there was a conspiracy.

Two, that the object and purpose of the conspiracy was to achieve monopoly power.

Three, that there was a specific intent to injure the Plaintiff as well as competition.

Now, I have already defined for you the meaning of a conspiracy in our discussion of section 1 of the Sherman Act. That definition is applicable here. However, unlike section 1, a conspiracy to violate section 2 must be a conspiracy to obtain monopoly power, that is, the power to exclude competition rather than to merely restrain competition, as is the case in section 1.

For the offense of conspiracy to monopolize as with the offense of attempt to monopolize, it is not necessary to demonstrate the goal of getting or keeping monopoly power has been achieved. A conspiracy or combination to monopolize requires the same proof as does an attempt to monopolize, except that plaintiff must prove that there was a conspiracy or combination of two or more persons whereas an attempt to monopolize may be the result of independent and individual action.

I instruct you that the relevant market to the extent you got to direct your attention to the concept of relevant market here is two fold. It has to do for your purposes with the outdoor advertising industry and geographically includes the area of Richland and Lexington Counties.

Now, the power to control prices and exclude—By the way, monopoly power also has to do with price control, the power to control prices, but that is not involved in this case.

Every company can, of course, set its own prices. That has nothing to do with our case.

I am skipping over that one entirely because it talks about price controls only.

This is what I was trying to get to. The law defines the power to exclude competition, and this, too, is within the concept of monopoly power, as the ability to remove competitors from the particular field of business in which the Defendant operates, or the ability to prevent new companies from entering the field.

The Plaintiff must prove that the Defendant had the power to drive a competitor out of the advertising market, the outdoor advertising market in the Richland and Lexington Counties area. The question is whether Columbia Outdoor Advertising Company had the power to do this. That is a question for you to decide. Remember, this is an essential element. If you do not find monopoly power, the Plaintiff's charge of unlawful monopolization must be decided in the Defendant's favor.

You will want to review a series of factors on which you have heard evidence and argument to decide whether the Plaintiff has proved the element of monopoly power. I am going to review a number of those factors in just a moment. I don't want to review too much because the clock is moving along.

You have got to find that the Defendant had the power to exclude competition or to maintain a monopoly that has been—That has come into existence lawfully or through other means including that of historical accident. This does not mean that you up must find that such power was absolute. That is to say that a defendant had no competitors whatsoever.

On the other hand, if you find that Defendant's power to do these things was not substantial, you must conclude that it did not have monopoly power.

It is for you to decide whether the evidence indicates that Columbia Outdoor Advertising was able to exclude competition or control prices to a substantial or significant degree.

Now, in this regard, you may consider all of the evidence that has been presented, the percentages of the market share that the parties have. You study in this

connection the trend of market shares, declining market share. Market share that has been increased over the years, may be evidence in an opposite direction.

You may consider that extra ordinarily large profits and a high rate of return enjoyed over a long period of time may reflect wholly lawful forms of competitive development, even superiority or length of time in the market.

Once again you must balance the competing arguments and resolve conflicts in the evidence. Take into account the evidence presented which tends to show that a company's success and profits were not because of monopoly power but because of its experiences and the quality of its service, the length of its time on the market. This is a subject on which you have heard much evidence and much argument. I merely remind you of your task in this respect. In the final analysis, you are the fact finders on this issue.

Monopoly power does not exist in a vacuum. If it exists, it must be found to exist in the relevant market. I already told you that the relevant market is a product market. It is a geographical area. I defined those for you.

We are to consider what monopoly means under the Sherman Act, which is not the same thing as its usage in loose and popular speech. Large size alone is not monopoly or monopoly power. At the same time, however, the size of a company is one factor you may consider among others in determining whether it has monopoly power.

Monopoly does not mean total control of the market or total absence of competitors.

If you find that a company's alleged monopoly and its maintenance was the result of its superior skill, foresight or hard work, then that would not be—Those facts standing alone and not through a deliberate unlawful effort to exclude others from the market, then, of course, you couldn't find for a Plaintiff.

You may find that the alleged monopoly and its maintenance was the result of historical accident. Historical

accident. The tongue starts going together after you have been talking so long.

That is without having intended to either put an end to existing competition or to prevent competition from arising where none had existed. A party may, nevertheless, develop a natural monopoly. That wouldn't be in violation of the law. The market may have been such that no other outdoor advertisers were interested in developing a business in the market.

A party does not violate the antitrust laws simply because its acquisition or maintenance of a monopoly was thrust upon it through these factors, or by market conditions.

Therefore, if you find that the acquisition or maintenance of Columbia Outdoor Advertising Company's alleged monopoly was the result of such historic accident, this would not be a violation of the law.

In order to succeed on its claim of attempted monopolization, the Plaintiff must also prove—I think I have given up the essence of this one. Let me see if I have. Yes, I have. I was about to read you a page and a half of something I had already given you. Where I can avoid doing so—

Once again, the relevant market includes the outdoor advertising business and the geographic area involved in this case, Richland and Lexington Counties.

I previously said, or if I have not I tell you now, the City of Columbia cannot be held liable for the offense of monopolization. The City cannot in this context monopolize, or attempt to monopolize.

You direct your attention on the issue of monopoly only to the allegation that the two parties conspired to monopolize. You may go further if you find that monopolization has been exercised by Columbia Outdoor Advertising or that it has attempted to monopolize, then you may assign culpability to that Defendant on those two concepts. There are three concepts in the monopoly cause of action. Monopolization, attempt to monopolize,



you can consider only conduct as it relates to Columbia Outdoor Advertising on these; and conspiracy to monopolize, you may consider the conduct of both Defendants on that issue.

We are coming along pretty good. I think I will keep my promise to you. I think I ought to be through with these about 3:00 o'clock, somewhere thereabouts.

In another of the counts to this complaint the Plaintiff alleges that the Defendant, Columbia Outdoor Advertising Company, has engaged in one or more unfair trade practices against this plaintiff.

The South Carolina legislature has enacted a statute which prohibits unfair trade practices. I will read it to you from the statute itself. I had it a moment ago. I don't have it now. Anyway the statute reads, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

For your information, as I said, that is the statutory law of the State of South Carolina.

A trade practice is unfair when it offends established public policy and is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

Unfairness in competition is similar to unfairness in any field of sports. That which violates the rules of the game is properly labeled unfair. Basically competitors are expected by the law to put forward for customers the opportunity to the customers to judge freely the quality, price and service each offers, as the product of its own effort and skill, without any violation of noncompetitive legal obligations. Thus the Court's have condemned certain activities as unfair trade practices. Disparagement, the use of false or disparaging statements aimed at destroying a competitor's good will. That being either his personal reputation or that of his product, commercial stability, credit rating or relations with customers, suppliers, laborers and the like, grant of promises or benefits.

The customer should be affected only by the quality, price or service of the competing product. Any attempt to influence him by bribery or the granting of undue advantage is an unfair trade practice. That, of course, I say very guardedly. You know companies every day are offering trips to Bermuda, and, of course, lower interest rates and whatever have you, buy one get one free. All kinds of gimmicks are offered. These have all been found to be perfectly lawful conduct.

Misrepresentation or misbranding. If a company represents to potential customers that something is not true thereby injuring another party, then, of course, an unfair trade practice has come into being.

Other unlawful conduct in business. This is involved the charge that a Defendant has gained an unfair competitive advantage by violating some law in its business activities.

You heard me mention some terms a moment ago. I suspect they were terms well known to you. I mentioned to you a trade practice is unfair when it offends established public policy, is immoral, unethical, oppressive, unscrupulous or substantially injurious to its customers.

Immoral, I suspect everybody knows what immoral means, but let's talk about it anyway. It means inconsistent with purity or good morals, contrary to conscience or moral law.

Unethical means not conforming to approved standards of behavior, a socially acceptable code or professionally endorsed principles and practices.

Oppressive means unreasonably burdensome, unjustly severe, rigorous, harsh.

Unscrupulous means unprincipled, have no moral integrity.

Injurious means inflicted or intending to inflict injury, intending to harm, damage or impair.

An unfair trade practice is an act which tend to deceive, and in fact does deceive consumers. The act must offend established public policy—I was about to say immoral, unethical. I already told you that one before.

To prove an unfair trade practice it is not enough for the Plaintiff to show that the Defendant was negligent or incompetent in the conduct of its business.

Negligence or inattention is not the kind of deceptive or unfair practice the law was intended to reach.

I have talked about the three causes of action that the Plaintiff alleges against the Defendants. I am going to talk to you now about a couple of other matters and I am winding down. Doing pretty good. I would be in trouble if this were Sunday morning and you were in the First Baptist Church.

For the Plaintiff to recover damages it is not enough to show that the Defendant violated the antitrust laws, but Plaintiff must also establish by a preponderance of the evidence that the violation of the antitrust laws was the proximate cause of the injury or damages to its business. An injury or damage is proximately caused by an act or failure to act whenever—

Well, proximate cause just means the direct cause. It is the legal cause. It is normally considered the cause without which the injury or damage would not have occurred. So an injury or damage is proximately caused by an act or failure to act whenever it appears from the evidence in the case that the act or omission placed a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

Injury differs from damages, which are the means of measuring the extent of injury in dollars and cents. Plaintiff's burden of showing injury is met if it has shown some dangers from the unlawful act or acts complained of.

Inquiry beyond this minimum point goes only to the amount of damages and not to the question of injury. It is enough that the Defendant's unlawful acts materially contributed to the Plaintiff's injury even though you may find that some other factors may have also contributed.

Plaintiff is not required to show that the Defendant's acts were the sole cause but only that it was a contributing cause to any damage or injury suffered by the Plaintiff.

In considering the whole question, you must look to the evidence as a whole. You must not isolate or compartmentalize the various factual aspects of the case. The Plaintiff need not have engaged in futile gestures or exhausted every possible avenue to avoid the effects of the Defendant's acts but may recover from any injury to which unlawful acts of Defendant materially contributed.

If you find that Plaintiff has shown that the Defendant violated the antitrust laws in such a fashion as would, as did cause injury to this plaintiff, and that such injury did occur, you may find for that the violation contributed to the cause of the injury.

Now, the purpose of damages in an antitrust suit is to put the Plaintiff—And this is true with respect to the unfair trade practices claim also. Is to put the Plaintiff in as good a position as that Plaintiff would have been in had not the violation or violations occurred. I am talking now about damages, really, because that is what damages is. We are talking about actual damages meaning to compensate. Compensable damages means to compensate. To restore the injured or damaged party to the position that party was in or would have been in absent the damage or injury.

If you decide for the Plaintiff on the question of liability and injury, you must then fix the amount of money which will reasonably and fairly compensate the Plaintiff for its damages.

Antitrust damages, while not limited in kind are generally of two types. It includes loss profits and the loss capital value of its business operation, if any.

Now, if you should find from a preponderance of the evidence in the case that damage to Plaintiff's business and property, such as a loss in the profits, was proximately caused by the Defendant's alleged illegal conduct



complained of, then the circumstances that the precise amount of Plaintiff's damages may be difficult to ascertain should not effect the Plaintiff's recovery. Particularly if the Defendant's alleged wrongdoings have caused the difficulty in determining the precise amount.

On the other hand, the Plaintiff is not to be awarded purely speculative damages. That is another way of saying that the Plaintiff is required to prove its damages by the preponderance of the evidence.

Now, the Plaintiff is not required to prove its damages to a mathematical certainty, but it must prove, it must offer proof which will enable you the jury to arrive at an amount which will be fair, just and proper.

An allowance for lost profits may be included in the damages awarded when there is some reasonable basis in the evidence in the case for determining that plaintiff has in fact suffered a loss of profits, even though the amount of such loss is difficult of ascertaining.

I charge up that a party is entitled to sue and recover damages under the antitrust laws only if it in fact has suffered a legal injury. That is to say, if it has been injured in its business or property by reason of anything forbidden by the antitrust laws; or turning your attention down to the Unfair Trade Practices Act, that a party has done something that is forbidden by the Unfair Trade Practices Act.

A party to recover must not only demonstrate by the preponderance of the evidence a violation of the particular law in question, antitrust law on the one hand, unfair trade practices on the other, but also that those violations actually caused injury to the Plaintiff's business or property.

If you should find from a preponderance of the evidence in the case that the Plaintiff is entitled to a verdict, the law provides that the Plaintiff is to be fairly compensated for all damage, if any, to its business and property which was proximately caused by the Defend-

ant's conduct in violation of the principles that I have outlined.

In arriving at the amount of the award, you should include any damages suffered by the Plaintiff because of lost profits and by reason of the diminution of its business enterprise.

If you should find from a preponderance of the evidence in the case that damage to the Plaintiff's business and property was proximately caused by the Defendant's illegal conduct complained of, then the circumstances that the precise amount of Plaintiff's damage may be difficult to ascertain should not effect the Plaintiff's recovery, particularly if the Defendant's wrongdoings have caused the difficulty in determining the precise amount.

On the other hand, the Plaintiff is not to be awarded purely speculative damages. In allowance for lost profits—correction.

An allowance for lost profits may be included in the damages awarded only where there is some reasonable basis in the evidence in the case for determining that plaintiff has in fact suffered a loss of profits, even though the amount of such loss is difficult to ascertain.

I have tried not to repeat myself, but I feel I have on occasion done so.

Lost profits means net profits and are determined by subtracting the costs and expenses of business from its gross revenues.

You are instructed that you may consider in determining whether or not any part of a Plaintiff's damages constitute loss net profits, any past earnings of the Plaintiff in the business in question, the uncertainty which makes the success of a business problematical, the experience of the Plaintiff's officers, the competition which the Plaintiff would have had in the area and the general market condition in that area.

It is a principal of the antitrust laws that a person faced with an unlawful injury which is capable of injuring his property may not sit idly by and allow damages

to accrue. He must do what he reasonably can both to avoid and reduce the amount of damages. If a plaintiff fails to mitigate, that is, to reduce this damages to the extent he reasonably can, he may be prevented from recovering some or all of this damages even though those damages resulted from an unlawful arrangement. If you find that the Plaintiff failed to mitigate its damages, you must reduce any computation of damages you arrive at by the amount of its failure to mitigate.

I instruct you that damages for loss of a going concern value cannot be recovered unless the Plaintiff's business has been terminated or sold in a forced sale. Inasmuch as the Plaintiff's business has not been terminated or sold loss of a going concern value may not be recovered by the Plaintiff in this case.

Now, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe that the Plaintiff should or should not prevail in this case.

I have neglected to give you one or two more instructions before I get to that point. Let me see if I can't put them in some context.

You will note that the verdict forms which I will give you in a moment does not set forth every dollar verdict which you may return.

I am going to skip this one. I think I can state it to you better.

I do say to you that on the question of damages that the Plaintiff claims its losses are composed of three parts. You will only get a line on the verdict form which will invite you, if you find for the Plaintiff, to return a dollar amount which you yourselves will compute and fill in.

The Plaintiff suggests that amount should include the following three components. Direct out of pocket expenses, lost profits, devaluation of its business.

If you find that these claimed losses or any losses resulted from the conduct of the Defendants, then your

verdict will be in favor of the Plaintiff with an assessment of damages, as is proved by you—As is proved to you by the evidence in the case. Now, you will follow the forms I will give you in a moment.

On the other hand, if the Plaintiff has not proved its damages or if the Plaintiff has not proved that the Defendants have violated any of the legal principles that I have outlined to you, you will return verdicts for the Defendants on those claims.

I may be offending some party but I am excluding some things at this point because I think I already covered them.

As I started to say to you a moment ago, the fact I gave you instructions concerning Plaintiff's damages should not be interpreted in any way as an indication that I believe the Plaintiff should or should not prevail.

Your verdict should represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous. I say verdict singular. You will see in a moment that you are being invited to return several verdicts because there are three separate causes of action.

Now, it is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgments. Each of you must decide the case for yourself but only after an impartial consideration of all the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your own views and to change your opinion if you can do so without violence to your conscience, but do not surrender your honest convictions concerning the weight or effect of the evidence solely because of the opinion or opinions of your fellow jurors, or indeed for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges. Your sole interest is to seek the truth from the evidence that has been presented.



Now, I have had prepared for your use some forms, some verdict forms on which you will record your verdict. I came in just a little beyond the two hours. Pretty good estimate though, wasn't it? I hope I haven't bored you.

Take these verdicts in with you. First of all I have written out some special interrogatories. These merely ask you to answer my questions yes or no.

Mr. Foreman, would you just look at these first, please. An interrogatory is a question.

My first question is, "Do you find that the Defendants, Columbia Outdoor Advertising, Incorporated, and the City of Columbia, conspired in restraint of trade against the Plaintiff, Omni Outdoor Advertising, Incorporated?" Do you find that? And down here I got a "yes" and a "no." Answer that question for me, please.

Now, remember any finding that you make must be a unanimous one. If your answer is "yes," just put me a check mark next to "yes." If your answer is "no," put me check mark there, please. Then turn the page. There is another question over here. This one has—The first one has to do with count one on conspiracy in restraint of trade under section 1 of the antitrust laws. Turn the page and this one has to do with count two on section 2 of the antitrust laws.

Do you find—You see I need your answer to this one because you see, remember, there are three prongs to this one. Plaintiff says Columbia Outdoor Advertising monopolized and it attempted to monopolize. The Plaintiff also says that both Defendants conspired to monopolize. So I need to know from you with respect to the concept of conspiracy, did they conspire?

This question is, "Do you find that Defendants, Columbia Outdoor Advertising, Incorporated, and the City of Columbia, conspired against the Plaintiff, Omni Outdoor Advertising, Incorporated, to monopolize the outdoor advertising market in Richland and Lexington Counties?" That is a question. Please answer it "yes" or "no" for me, and then you sign it, Mr. Foreman.

Now, having answered those questions you turn your attention, please, to the verdicts that I have had prepared for you. I am asking that you return separate verdicts as to each of the three causes of action. I have clipped your alternative, the options for you together.

As to count one, and its got count 1 right up there under the word "verdict." It says, if you find, for example, on the conspiracy and restraint of trade cause of action that the Plaintiff has not established its case by the greater weight or the preponderance of the evidence—I am just about through now, is everybody all right? This won't take but a couple little seconds or a minute. I know I had you a long time and I apologize. I am about through. I am about ready to send you into your room.

If you find that the Plaintiff has not by the preponderance or greater weight of the evidence established that these Defendants conspired against this Plaintiff in restraint of trade, you return a verdict for the Defendants. In this regard I have got a form here. Actually I got two forms here. It says, "We, the jury, unanimously find"—Wait a minute. I picked up the wrong group.

It says, "We, the jury, unanimously find for the Defendant Columbia Outdoor Advertising Company, this — day of January, 1986."

For your information it is still January, today being January 30. Tomorrow, if you don't reach the verdict today, being January 31st. Anything after that we will have to change and write in February.

Let's see. On that one you have got—I will put them together for you. There is also one here that says, "We find for the Defendant, City of Columbia." That is if the Plaintiff has failed to prove its case against the Defendants on the question of conspiracy, you would return verdicts for the Defendants on that count.

I have got two forms here. Bring me two verdicts. One for Columbia Outdoor Advertising and one for the City of Columbia. I have got them bracketed together.

Then, of course, in the event your verdict is that the Plaintiff has made out its case against the Defendants on the question of conspiracy, you return a verdict for the Plaintiff.

Now you return your two verdicts for this reason. You will return monetary damages only against the Defendant, Columbia Outdoor Advertising Company. You will not return monetary damages against the City of Columbia. But you, nevertheless, will return two verdicts.

As to the one concerning Columbia Outdoor Advertising Company, your verdict will read, "We, the jury, unanimously find for the Plaintiff, Omni Outdoor Advertising, Incorporated, against the Defendant, Columbia Outdoor Advertising, Incorporated, the sum of ——— dollars, this ——— day of January, 1986."

Please use both words and figures just as you would if you were making out a check. You sign it, Mr. Foreman. You see that it wouldn't be practical to ask all of you to sign it. So I ask only the Foreman to sign it. Mr. Foreman, you don't sign it until and unless the verdict therein expressed the unanimous verdict of all.

Now, you also having found that the Plaintiff has made out its case of conspiracy, would return a verdict against the City. This one reads, "We, the jury, unanimously find for the Plaintiff, Omni Outdoor Advertising, Incorporated, against the City of Columbia, this ——— day of January, 1986."

This one doesn't contain a monetary amount. You see in the event you return this verdict, I will take action, appropriate action against the City, which will not include a monetary amount, but it would include other action by the Court against the City.

All right. I have said I am putting these two together. I hope you are understanding me, Mr. Foreman.

THE FOREMAN: Yes, sir.

THE COURT: Turning my attention now to count two. If you find that—This one is on monopoly now. It

is on monopoly, attempt to monopolize and conspiracy to monopolize.

If you find that the Plaintiff has made out its case against the Defendant, Columbia Outdoor Advertising Company, and against the City of Columbia on the question of conspiracy.

Now, remember the City is included only on the conspiracy aspect of monopolization. And if you further find that the City (sic) has made out its case on monopoly, and/or attempt to monopolize against Columbia Outdoor Advertising Company, you will return verdicts for the Plaintiff. I have got your form here.

The form says, "We, the jury, unanimously find for the Plaintiff, Omni Outdoor Advertising Company, against the Defendant, Columbia Outdoor Advertising, Incorporated, the sum of ——— dollars actual damages this ——— day of January, 1986."

In that event, having also found conspiracy, you would also find a verdict against the City of Columbia, but you would not return a monetary amount.

If you find that the City—I am sorry. If you find that the Defendant—Correction again.

If you find that the Plaintiff has not made out its case by the preponderance or greater weight of the evidence on monopolization or attempt at monopolization or conspiracy to monopolize, please bring me back two verdicts. One for the Defendant, Columbia Outdoor Advertising Company, and one for the City of Columbia.

Now, I got all of these pinned together. Going now down to count eight of the complaint. This one is on unfair trade practices. This one has to do only with Columbia Outdoor Advertising Company. If you find that the Plaintiff has not by the greater weight or the preponderance of the evidence made out its claim against the Columbia Outdoor Advertising Company, bring in a verdict for the Defendant.

If you find that the Plaintiff has made out its case against this Defendant on its unfair trade practices claim, bring in a verdict for the Plaintiff.



I have two verdict forms here for you. One says, if it has not brought in—If the Plaintiff has not made out its case, it says, "We, the jury, unanimously find for the Defendant, Columbia Outdoor Advertising Company, on this day."

If you find that the Plaintiff has made out its case by the preponderance or greater weight of the evidence, I got your form here. It says, "We, the jury, unanimously find for the Plaintiff, Omni Outdoor Advertising Company, against the Defendant, Columbia Outdoor Advertising, Incorporated, the sum of — dollars." Again using words and figures. "Actual damages this — day of January, 1986."

If during your deliberations you desire to communicate with me, please, Mr. Foreman, reduce your message to writing. Put your question, if you have a question in writing. You sign it, please. Pass it out to the Marshall who will bring it to me. I will answer you as soon as I can. Sometimes I can write you a note. If your question is such that I can do it, I will do that.

If instead I must speak with you orally, for example, if you want to hear some item of testimony read to you, I will have to ask our court reporter to find that item of testimony, or if you want some instructions read to you again, I will have to locate that instruction. I will have to interact with the lawyers in your absence before I bring you out.

So if you send me out a note, don't think we are out—I will go into operation immediately. It may take me some time to send for you because I have to confer with them before I bring you out. We won't be out here just twiddling our thumbs. I will go into immediate operation. I will then have you brought into the courtroom and I will instruct you on that.

If you do write me a note, please don't tell me how you are numerically divided at that time. That is your business. Now, I am going to ask you to go into your room.

You see in your absence I have to discuss with the lawyers the adequacy of these instructions. If it develops that I have created some kind of a misapprehension because I have erroneously stated some principle to you, or if I have erroneously omitted some instruction that I ought to have given you, I would then have to ask you to come back, and I will have to try and remove that misapprehension.

In the unlikely event that these instructions are deemed to have been adequate, I will then ask you, Mr. Foreman, to return and we will pass the verdict forms and the exhibits. You are going to need wheel barrels and whatever to get these into the jury room. You carry all the exhibits into the room with you, and then you may commence your deliberations.

When you are ready with your verdicts, knock on the door and let us know you are ready. I will have the parties assembled, and I will bring you into the courtroom and you may announce your verdict.

This late in the day you got hundreds of pieces of evidence to review. I don't know whether you will reach a verdict quickly or whether you will need a lot of time. You may need into tomorrow to reach your verdict. If that be the case, I will at a reasonable hour inquire on your progress. I will inquire whether you want to go out to dinner or whether the circumstances is such you want to recess for the night and come back tomorrow. I will make that inquiry at a reasonable time. Somewhere after 5:00 o'clock. For now, please go to your room and wait for me to call for you.

(Out of the presence of the jury).

THE COURT: Are there any exception or requests for additional instructions on the part of the Plaintiff?

MR. CHASTAIN: Your Honor, we appreciate the complexity of the case, the lengthiness of the effort you had to go through. I admire it. I do have a couple of things that I feel I need.

THE COURT: Never had a moments doubt.

MR. CHASTAIN: Your Honor, we believe we would have to except in your monopolization charge and the fact you omitted that there is a presumption or prima facie case or very strong evidence of the existence of a monopoly when there is a 90 percent market share. You did say when there was a high percentage market share.

THE COURT: I did some paraphrasing right there. I departed your written instruction and I said the higher it goes the greater the likelihood. I think that is pretty fair paraphrasing.

MR. CHASTAIN: It is since they admit they had 95 or 100 percent we kind of like the 100 percent.

Your Honor, I am looking down at my notes.

THE COURT: I apologize to you. I mixed them up. I grouped them topically.

MR. CHASTAIN: I thought you did a good job of mixing them up, your Honor. It made it interesting in trying to follow. We, of course, maintain our continuing objection to the view that the City may not monopolize. Of course, you gave specific instructions to that affect. That is simply in the maintenance of our standard view of that position.

Your Honor, I think in your instructions with regard to the verdict form you probably covered this. I have down here a note to except to the failure of giving our proposed jury instruction B

THE COURT: I did. As I was about to read it to the jury, and I had at that point been going right at two hours I perceived I could come in and do the essence of what you were asking me to do. So I did the substance of that I am fairly well certain. Do you except to my failure to read yours verbatim?

MR. CHASTAIN: No, your Honor, I do not.

We do, however, except with regard to our proposed instruction F. Your Honor read the substance of the first part of that but did not read the last part, particularly the burden of proof aspect with regard to the

Noerr-Pennington exception. Of course, your Honor to place on the record the whole Noerr-Pennington issue—I believe it is on the record but for the sake of completeness, we believe Noerr-Pennington should not be in the case on the ground the City has no Parker immunity. Therefore, COA cannot immunize itself from liability for its acts by petitioning an entity which it cannot undertake such acts. Petitioning the City is not like petitioning the state. I am simply saying when you petition the state that is one thing, but the City has no Parker immunity in this case.

THE COURT: I thought I was talking about the right of the citizens to petition their government. That is true not only with state Government but it is true with respect to municipal government.

MR. CHASTAIN: However, your Honor, that is our exception. We believe in the absence of Parker immunity the petitioning the City to take anti-competitive action is just like going over and asking Donrey or somebody else to take adequate competitive action.

THE COURT: I may have erred there. I don't know.

MR. CHASTAIN: We do except to that and we believe that is not proper. The whole Noerr-Pennington exception does not exist in this case. Subject to that within the Noerr-Pennington exception being given we feel your Honor did not give the second half of our instruction F on genuine activity. On the other hand, your Honor did cover it elsewhere. We felt it would be desirable to have a succinct statement. You covered it in the overall instruction. If I could sit down and read them all, I might be thorough. I simply wanted to place on the record we felt F should have been covered.

With regard to E, our proposed jury instruction E, your Honor, we do except to that, the failure to read that, in that it did not—Your Honor's instructions did not cover specifically that an individual could be conspired with by COA and they could return a verdict against COA.



THE COURT: I recognize I did not give that. I think my having declined to give it was a proper decision because I viewed the evidence as it relates to the Mayor and City Council as having accused them of having taken action in their official capacities only instead of in their individual capacities. That was my reasoning. I readily appreciate that I diverted from your view in that case.

MR. CHASTAIN: Yes, sir. I understand. I just need to place it on the record.

THE COURT: Yes.

MR. CHASTAIN: Your Honor, if I can briefly look here. In your instructions, you did give the substance of Defendant's request to the charge number five. We do respectfully except to that in that we believe it places a greater burden of proof on the Plaintiff than is entirely commensurate with the rest of the instructions.

THE COURT: All right. I try to always remind them and I made a point to remind them periodically that the Plaintiff's burden was proof by the preponderance of the evidence or the greater weight.

MR. CHASTAIN: You did, sir. And upon reviewing the whole record that would be cured. You did give number five. We had a problem with it. I felt we had to state that.

Your Honor, you edited City's number five in a manner which we found not entirely with our views but not such we need to place a formal exception on the record to it.

Finally, your Honor, I believe the issue of the mental state of the Defendants, I believe if—Again, I am like the jury I have been two hours listening to the sermon. It was a good sermon but I am not 100 percent sure I recall everything in it.

To the best of my recollection the tone of the mental state of that the Defendants was emerged from your charge as having to be pretty much one of where they needed to feel they were doing or acting wrongfully. As you know, we stuck to the idea they simply had to willfully wish to be anti-competitive. We don't feel there was

—Although we had a couple of phrases to that effect in our proposed instructions, particularly number 20-A, that was not given and we would except to that.

I believe that is it.

THE COURT: All right. Perceiving as I do that I gave the substance of those requests submitted by the Plaintiff that were proper for consideration of this case, though not always in the exact language proposed, and perceiving further that those that I did not give were not given by conscious decision not to give them, your exceptions are hereby overruled.

MR. CHASTAIN: Thank you, your Honor.

THE COURT: Columbia Outdoor Advertising.

MR. McDONALD: Your Honor, with respect to your charge on damages, you charged the Plaintiff's proposed jury instruction C and included in that the devaluation of the business. We except to that.

In plaintiff's charge number 26 you referred to two kinds of antitrust damages, lost profits and lost capital value, if any, of its business operation. We except to that.

THE COURT: That was essentially the same as devaluation, wasn't it?

MR. McDONALD: That's correct. Then you referred in another part of your charge to the fact the loss of going concern value may not be recovered. I thought that to be inconsistent with your charges that they could recover a lost capital value or devaluation of the plant. If you take the position that loss of going concern value may not be recovered, which I believe is a proper and correct position, then the charge on damages in our view should not have included loss capital value or devaluation of the plant.

Now, that takes care of that one.

In Plaintiff's instruction number 31 relating to unfair trade practices, you charged—You illustrated certain kinds of activities as being unfair trade practices and that included disparagement, a grant or promise of benefits which—

THE COURT: I had a little problem with that one as I was reading it. I was already into it and couldn't find a way out of it. I tried to get out of it by saying, you know, all merchants offer a trip to Bermuda.

MR. McDONALD: I heard you try to get out of it.

THE COURT: I don't really think I succeeded.

MR. McDONALD: And misrepresentation and unfair conduct of business. Anyway, we thought those were broad and we except to those charges.

THE COURT: My problem was you see when we were in the charge conference, you know, we had so many of these that I could not honestly tell you that I read down through that one thoroughly during the charge conference. As I was reading it today, I thought it was something that had no objections, but when I got down to that I immediately halfway in the sentence found the problem. I knew I would hear from you. I never had a moments doubt I would hear from you. Then I tried to rescue it.

MR. CHASTAIN: I thought you cured it, your Honor.

THE COURT: It was a feeble effort at best.

MR. McDONALD: If your Honor please, you gave the standard charge on damages that can't be speculative but must be enough proof for you to do what is fair, just and reasonable. It seemed to me that we were entitled to the ascertainable feature of the South Carolina Unfair Trade Practices Act and I didn't hear that given anywhere.

THE COURT: I was talking about damages in general. Of course, what I said I gather you take no issue with its application to the antitrust features?

MR. McDONALD: That is correct.

THE COURT: When I come down to the South Carolina Unfair Trade Practices you think I ought to have gone further?

MR. McDONALD: I think you should have told them what the act says about the damages. That is they have

got to be ascertainable and then describe what that means.

THE COURT: Did you give me an instruction on what that means?

MR. McDONALD: I don't know that we did. We did insist that the word ascertainable had some special meaning.

THE COURT: I remember you insisted upon that.

MR. McDONALD: We asked you to read the statute.

MR. ROBINSON: There is another section that refers back and talks about ascertainable damages.

THE COURT: Do you want me to do it?

MR. CHASTAIN: Your Honor, we think they have been adequately instructed.

THE COURT: Frankly, I think so too.

MR. McDONALD: We would like to reserve our objection for the record.

THE COURT: All right.

MR. McDONALD: I don't remember you charging even if you find there was illegal activity if you also find it didn't damage the Plaintiff, the Plaintiff couldn't recover.

THE COURT: I did that. I pointedly did that one. By that time I lost your attention. See the damage discussions started at five minutes to two, five minutes to three, I beg your pardon.

MR. McDONALD: Your Honor, I must confess I took your charge to say in one place on the business of lobbying that if the person lobbies solely to exclude the competition, that that is—I forget the words you used, not permitted or acceptable.

THE COURT: As a matter of fact, I was struggling between two groups of submissions to me.

MR. ROBINSON: Your Honor, on that subject I wrote down that COA brought about the ordinance for the sole purpose of barring access to the Columbia market and thereby conspired, then the conduct was not protected and illegal. As I understand the law, the fact that



COA would lobby to out right bar Omni is not a conspiracy, number one.

Number two, it is protected under Noerr-Pennington. Those are my notes on the subject. I felt that was bad law.

THE COURT: I think you are right.

MR. CHASTAIN: Your Honor, there was a lot of instruction back and forth on Noerr-Pennington. We got an exception on it, too. I think they had a lot of words on it. I think we had enough.

THE COURT: You see if I had just stuck with the instruction that I pointedly gave out of Affiliated Capital versus City of Houston, I believe I would have included everything that everybody could have wanted, but then I parted and tried to give them what each of you had submitted to me and that is when, of course, I ran into the thicket.

MR. CHASTAIN: Your Honor, I really thing this jury has been sitting here for three weeks. I am not 100 percent satisfied with it. I got an exception to it. They got an exception. I think we would be better off and them included if you just leave them alone on it.

MR. McDONALD: Your Honor, that gives us reversible error. If that is your choice, all right.

THE COURT: That never bothers me. That is what they are up in Richmond for.

MR. McDONALD: I didn't thing I would frighten you.

THE COURT: Not in the least.

MR. McDONALD: Nevertheless, that is our exception. We think a person can lobby for anti-competitive activities.

There is a relative market problem that we want to except to. You took that upon yourself. We thought it was a jury question.

THE COURT: All right.

MR. ROBINSON: We also think it should not be the outdoor advertising industry but the overall entire media

THE COURT: Yes. I knew I would run into problems with you there. I will have to take my chances on that one.

MR. McDONALD: If your Honor please, there were a number of charges that I didn't pick up that we requested you charge. Some of which may be covered adequately.

THE COURT: I thought I did. Here is the point. You might have seen me up here flipping pages. When I got to a point where I felt I already covered the subject properly, I then reached a decision that where you wanted a particular slant on it and I would merely be redundant to something I already said, I flipped the page and probably saved us 30 minutes in the process.

MR. McDONALD: Let me do this then, because I can't be sure that you have not paraphrased what we were saying. I would like to just read the numbers of the exceptions that as you went I pulled the sheet thinking it had not been charged as we had stated it.

THE COURT: All right.

MR. McDONALD: Number one. That is defendant number one, defendant's two, defendant's nine, defendant's 13, defendant's 15, 16, 18, 19, 21, 22, and that is it. I concede that again if I review the whole record I may conclude you had adequately charged those, but I did not hear them charged in our words. I want to protect myself upon the record.

THE COURT: All right, perceiving as I do—

MR. ROBINSON: We had discussed Plaintiff's number 21, your Honor, you were going to read from the book. Instead you read Plaintiff's 21 and neglected to insert the monopolization conduct had to be wrong or improper. We had previously discussed it. I wanted to make an exception.

THE COURT: All right. I have the impression that I said that monopolization conduct had to be for the purpose of either establishing or maintaining monopoly. I believe I covered the sense of that though not necessarily in the language that the statute may have specified.

Let me simply say that upon consideration of Columbia Outdoor Advertising exceptions that while it is possible that I went a stray somewhere along the line, and I guess I am a little concerned about the possibility that I said that lobbying itself may be a conspiracy. If I said that, I am certain that I was wrong, but if I said that activity was pursued for the purpose or in furtherance of a conspiracy, then it wasn't protected. I thought that my whole instruction on Noerr-Pennington developed that concept. If I made a misstep somewhere along the way, I think it was a misstep and in the harmless error area. I am inclined I ought to take my chances on that. Your exceptions are overruled.

MR. CHASTAIN: One thing, your Honor will recall they withdraw over our protest their request to charge number eleven at the charging conference. We like it and, of course, your Honor, didn't give it, but we would like to note an exception to it not being given.

THE COURT: All right.

MR. MEGGS: Your Honor, in an effort to save time may I adopt the exceptions taken by Mr. McDonald?

THE COURT: You may.

MR. MEGGS: Most importantly for the City was the charge dealing with, it was right at the first of the jury instructions with regard to corporations. The fact they act through their agents and employees. They may bind the corporation by their acts and statements made in the scope of their duties. That applies to the governmental agency which was also indicated as a corporate party to this litigation.

My concern is that coupled with a charge on Noerr-Pennington, I think we went from that charge to my five member council and the majority must vote to enact ordinances. Then we went to the Noerr-Pennington charge. Of course the basis of the Noerr-Pennington charge is if one or more of the public officials involved conspires with the private party, the private party's protection fails.

My concern is that the jury could take those three instructions and come out with the erroneous conclusion that if they found, for example, that COA, that Mayor Finlay was acting in conspiracy with Columbia Outdoor then that made a conspiracy which bound the City of Columbia.

THE COURT: I tried to avoid that possibility. I gave your requested instruction and might have stated in addition to what you suggested that the City acts through its City Council and its elected officials.

I don't know if I said—I know there was acting pursuant to authority properly delegated to them. If I didn't, I ought to have said that. I certainly said, you know, as requested by you, how the City acts.

MR. MEGGS: Of course we offered the charge number five which indicated that—I think there was a portion of our request number five not charged.

THE COURT: I just didn't tell them how many councilmen had to vote. That is what I left out. I did tell them in 1982 there a Mayor and four members of council, and I said a majority of them had to act.

MR. MEGGS: I understand. My only concern is the situation, that there may be the erroneous impression base charge on Noerr-Pennington, one or more conspired and coupled with that initial charge on the agency situation, that there may be the erroneous impression with the jury that merely one of the five acting in conspiracy with COA would be enough to bind the City, to put the City in conspiracy with Columbia Outdoor.

THE COURT: Do you think they could do that in the face of my instruction that a majority of the members of council had to act in order for the City to do something?

MR. MEGGS: Yes, sir, because of the steps for the chronological—Because of the fashion in which they were given by that insofar as the sequence of those instructions I believe they could come down with that type of understanding. We except on that basis.



THE COURT: All right. Quite frankly I don't know I share your concern. Yet out of an abundance of precaution if you think it would help, I will be glad to tell them that.

MR. MEGGS: Your Honor, there is one paragraph in my request number five that I think would resolve the problem. That is on the first full paragraph on page three.

THE COURT: Is that a Noerr-Pennington instruction?

MR. MEGGS: The remainder of request five dealt tangentially with Noerr-Pennington. This reads, "In order to find against the City of Columbia, you must find based upon a preponderance of the evidence at least three of the members of City Council were acting pursuant to an illegal agreement with COA to enact ordinances unreasonable—"

THE COURT: I think I gave them in essence that. I substantially charged that. If it was not done in the precise language you proposed, I think, nevertheless, the substance of it was given.

MR. MEGGS: That's the exceptions we have.

MR. LEWIS: I have one point, your Honor. I am assuming—

THE COURT: The City's are overruled.

MR. LEWIS: This has nothing to do with the instructions. Earlier on you mentioned you might have wanted the jury, if they found a verdict under the unfair trade practices to let you know if it was willful in helping you determine if it should be trebled.

THE COURT: I guess I forgot to do that and nobody called it to my attention when I was putting together the interrogatories.

MR. LEWIS: I was assuming you were going to do it yourself.

THE COURT: I ought to have done it. I generally do it. How do you want to handle it?

I think he is entitled to it. I wish I had remembered to do it then because normally I send a typed written interrogatory that asks them that question. I can have it done.

MR. LEWIS: I don't know. I just bring it up. I didn't know why.

THE COURT: I forgot to do it. That is why I didn't do it. I think you are entitled to it.

Mr. McDonald, Mr. Robinson?

MR. McDONALD: No, sir, we disagree strongly.

THE COURT: I had no doubt about that.

MR. LEWIS: Your Honor, I would suggest this and I think it would be the easiest way to do it. That when, if and when the verdict comes, if there is a verdict, that you will send in at that time with the Marshal interrogatory number three, it says, "If you have found a verdict against Columbia Outdoor Advertising on unfair trade practices, was that violation willful, yes or no?"

THE COURT: During when the verdict is announced as opposed to now?

MR. LEWIS: Yes.

THE COURT: I know you are opposed to the idea completely

MR. McDONALD: Let me tell you why.

THE COURT: I have no doubt you will articulate for me a very cogent reason. My view of the evidence is such that I tell you I think he is entitled to it.

MR. McDONALD: May I put my reason on the record?

THE COURT: Yes.

MR. McDONALD: Your Honor, as I understand it, it was charged you couldn't have a violation of the Unfair Trade Practices Act based on mere negligence. I don't think you can have a violation of the Unfair Labor Practices Trade Act unless it is willful. I don't think anything less than willful will support a violation.

THE COURT: If that is your view, then there would be an automatic trebling.

MR. LEWIS: We accept that.

MR. McDONALD: We think in essence you said you can't do it any other way.

MR. LEWIS: We accept that.

THE COURT: The Court considers that is the position of the parties and will act accordingly in the event of a verdict for the Plaintiff on that issue.

THE COURT: Please ask the foreman to join us.

MR. McDONALD: Your Honor, just a moment.

THE COURT: Ask the foreman to wait just a moment, please.

MR. McDONALD: We think the decision is for the Court on willfulness.

THE COURT: That is what the statute says.

MR. McDONALD: Not for the jury.

THE COURT: Of course, if the jury finds the absence of negligence—He is right, the statute says it is for the Court.

MR. McDONALD: I want to clear up any inconsistency.

THE COURT: I mentioned to you I normally send such an interrogatory. The response to it is advisory. The finding is still one that has to be made by the Court.

MR. McDONALD: If all you are seeking is an advisory opinion, then we withdraw the objection.

MR. LEWIS: Your Honor, he said that would be willful, we understand it is up to you. With that in mind, we don't think it should be any more confusing now. We accept Mr. McDonald's understanding.

MR. McDONALD: We don't accept any automatic treble damages.

MR. LEWIS: He accepts when it comes out it is willful.

MR. McDONALD: I do not accept if it comes out it is willful. That was a misstatement. What I meant to say—As they say I misspoke. What I meant to say was I didn't think it was for the jury to say it was willful.

It is for you to determine after they bring out a verdict against us on that count whether or not it was willful and, therefore, entitles them to treble damages.

MR. LEWIS: That is fine, your Honor. But he did say he accepted it as willful.

THE COURT: He did it and he says now he misspoke.

MR. McDONALD: Your Honor, consistency is the hobgoblin of small minds.

THE COURT: Now, ask the foreman to join us, please.

(Within the presence of the Foreman).

THE COURT: Mr. Foreman, I will have the clerk give you the verdict form and the exhibits, but there is so many of them I will ask the marshal and others to help you carry the voluminous exhibits into the room. It is now nearly 4:00.

I will tell you what, Mr. Foreman, send me out a note, please about quarter after five and tell me whether or not you want to go to dinner or whether you want to recess for the evening and come back tomorrow morning.

Have you got pencils and paper, Mr. Foreman?

THE FOREMAN: No, sir,

THE COURT: I will ask the clerk to bring you in a pad, paper and pencil.

Please ask Ms. Galliher, the alternate juror, to join us.

(The alternate juror was excused.)

THE COURT: Are there any exceptions now to anything that has transpired other than your exceptions that you otherwise stated for the Plaintiff?

MR. LEWIS: No, sir.

THE COURT: For Columbia Outdoor Advertising?

MR. McDONALD: No, your Honor.

THE COURT: For City of Columbia?

MR. MEGGS: No, your Honor.



THE COURT: The case was very well tried, may the best party win. The long wait now begins.

(Jury begins deliberations at 3:55 p.m.).

(Within the presence of the jury at 5:20 p.m.).

THE COURT: Mr. Foreman, ladies and gentlemen, I got your note. You have announced your decision to retire for the day and return tomorrow morning. Certainly I am happy to accommodate your request. What time do you want to start in the morning? I don't suppose you gave that a thought.

THE FOREMAN: 9:30.

THE COURT: All right, fine. You are hereby excused until tomorrow morning at the designated time. During your absence, may I again emphasize the importance of your not discussing this case. Do not permit it to be discussed with you or in your presence. You will note that I state that. I take great care to state that to you every day. I said it somewhat earlier today that I know you regard that kind of as \* \* \*

\* \* \*

EXCERPTS FROM JURY'S ANSWERS  
TO SPECIAL INTERROGATORIES  
[PAGES C.A. APP. 2502-2504]

\* \* \*

THE CLERK: May it please the Court, civil action 82-72 Omni Outdoor Advertising, Inc., versus Columbia Outdoor Advertising, Inc. and the City of Columbia.

Special Interrogatories: Count 1, conspiracy and restraint of trade. Do you find that the Defendants, Columbia Outdoor Advertising, Inc., and the City of Columbia conspired in restraint of trade against the Plaintiff, Omni Outdoor Advertising, Inc? Answer: Yes.

Count 2, monopolization, attempt to monopolize, conspiracy to monopolize, do you find that the Defendants, Columbia Outdoor Advertising Inc., and the City of Columbia conspired against the Plaintiff, Omni Outdoor Advertising Inc., to monopolize the outdoor advertising market in Richland and Lexington Counties? Answer: Yes.

Signed, Willy C. Carter, Jr., Foreman, January 31, 1986.

The Verdict: Count 1, conspiracy and restraint of trade. We the jury unanimously find for the Plaintiff, Omni Outdoor Advertising, Inc., against Defendant, Columbia Outdoor Advertising, Inc., the sum of \$600,000 actual damages this 31st day of January, 1986.

Signed, Willy C. Carter, Jr., Foreman.

Verdict: Count 1, conspiracy and restraint of trade. We the jury unanimously find for the Plaintiff, Omni Outdoor Advertising, Inc., against the Defendant, City of Columbia this 31st day of January, 1986.

Signed, Willy C. Carter, Jr., Foreman.

Verdict: Count 2, monopolization or attempt to monopolize or conspiracy to monopolize. We the jury unanimously find for the Plaintiff, Omni Outdoor Advertising, Inc., against Defendant, Columbia Outdoor Advertising, Inc., the sum of \$400,000 actual damages this 31st day of January, 1986,

Signed, Willy C. Carter, Jr., Foreman.

Verdict: Count 2, monopolization or attempt to monopolize or conspiracy to monopolize. We the jury unanimously find for the Plaintiff, Omni Outdoor Advertising, Inc. against the Defendant, City of Columbia this 31st day of January, 1986.

Signed, Willy C. Carter, Jr., Foreman.

Verdict: Count 8, unfair trade practices. We the jury unanimously find for the Plaintiff, Omni Outdoor Advertising, Inc., against Defendant, Columbia Outdoor Advertising, Inc., the sum of \$11,000 actual damages this 31st day of January, 1986.

Signed, Willy C. Carter, Jr., Foreman.

Ladies and gentlemen of the jury, if this is your verdict, so say all of you?

(The jury responded in the affirmative).

• • • •

**EXHIBIT 15—1982 ORDINANCE REFERENCED IN  
7/21/82 LETTER  
[PAGES C.A. APP. 2649]**

**ORDINANCE**

Amending 1979 Code of Ordinances of the City of Columbia, Part 2, Chapter 2, Article E, Division X, Section 2-2104, Off Premises Commercial Advertising

BE IT ORDERED by the City Council of the City of Columbia, South Carolina, this \_\_\_\_\_ day of \_\_\_\_\_, 1982, that Part 2, Chapter 2, Article E, Division X, Section 2-2104, of the 1979 Code of Ordinances of the City of Columbia be amended to read as follows:

**Section 2-2104 Off Premises Commercial Advertising**

It shall be unlawful hereafter for any person to erect within the City of Columbia any billboard or sign for off-premises commercial advertising.

This ordinance shall become effective \_\_\_\_\_.

Requested by:

\_\_\_\_\_

\_\_\_\_\_  
MAYOR

Approved by:

\_\_\_\_\_

City Manager

ATTEST:

Approved as to form:

\_\_\_\_\_

City Attorney

\_\_\_\_\_  
City Clerk

Introduced \_\_\_\_\_

Final Reading \_\_\_\_\_



**EXHIBIT 17—ORDER OF JUDGE CURETON  
(JULY, 1982) FINDING ORDINANCE 82-12  
UNCONSTITUTIONAL  
[PAGES C.A. APP. 2658-2663]**

**IN THE COURT OF COMMON PLEAS  
STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND**

Civil Action No. 82-CP-40-1414

OMNI OUTDOOR ADVERTISING, INC.,  
*Petitioner,*

-vs-

CITY OF COLUMBIA,  
*Respondent.*

**ORDER**

This matter came before me on June 22, 1982, for a hearing on a Rule to Show Cause why a new billboard ordinance enacted by the City of Columbia should not be declared unconstitutional on its face and why an injunction should not be issued against the City of Columbia prohibiting it from interfering with the construction of outdoor advertising signs by Petitioner on twelve sites for which permits for construction of outdoor signs have already been obtained by Petitioner from the City.

The Petitioner contends that the ordinance is unconstitutional because it contains no standards governing its enforcement and is arbitrary in nature.

The following facts were stipulated or established by testimony and exhibits:

(1) On March 24, 1982, City Council for the City of Columbia adopted Ordinance number 82-12 (codified as Section 2-2104 of the City Code) as follows:

It shall be unlawful for any person to erect within the City of Columbia any billboard or sign for off-premises commercial advertising without first obtaining an erection permit from the Building Official which may be issued only upon the approval of the location, size and compatibility with public safety by City Council after a public hearing.

(2) Prior to March 24, 1982, Petitioner had obtained permits from the City for the erection of outdoor advertising signs ("billboards") at twenty-seven site locations within the City.

(3) On March 24, 1982, and March 26, 1982, E. C. Hornsby, Superintendent of Inspections for the City of Columbia, notified the Petitioner in writing that it should not pursue further erection of signs on property in twelve locations until the new ordinance was complied with. The twelve locations were as follows: 1921 Taylor Street, 1727 Sumter Street, 1819 Laurel Street, 910 Huger Street, 801 Harden Street, 600 Gervais Street, 520 Huger Street, 701 Gervais Street, 1040 Gervais Street, 1800 Block Harden Street (West Side), 5006 North Main Street and 3617 North Main Street.

(4) The site locations for Petitioner signs located at 2006 Gervais Street, 2327 Academy Street and 3401 Farrow Road, not listed in Mr. Hornsby's letter, are not affected by these proceedings since construction had commenced upon them, and the City took no action to prohibit erection of the signs for which permits had been issued. In addition, the City did not attempt to apply the ordinance to twelve additional site locations not listed in Mr. Hornsby's letter because the City did not notify

Petitioner that it may not begin construction on those locations.

(5) Petitioner has expended substantial resources in terms of both personnel and funds (approximately between \$6,000 and \$18,000 per site location) with regard to the acquisition of the twelve site locations affected by the ordinance prior to and subsequent to the issuance of permits by the City for such locations. In addition, Petitioner has expended approximately \$300,000 in conducting market surveys for all of its site locations in the City of Columbia market area, of which approximately 10% is allocated to the twelve affected site locations. Although Petitioner contacted for certain services with respect to these locations prior to the issuance of permits by the City, Petitioner paid concessions for leasing such locations only after it was issued permits therefor.

(6) The twelve affected site locations are priority sites for Petitioner because they provide a balance in the market place between county and city advertising exposure.

(7) The regulation of billboards, in general, is a permissible use of a municipality's police power because it relates to public safety. The ordinance adopted by the City of Columbia does not relate to public health.

I have made the following conclusions of Law:

It is a fundamental tenet of constitutional law that a municipal ordinance is unconstitutional on its face and void if it restricts the right that a person might otherwise exercise over his property without reference to any general or uniform rule, leaving such right to the despotic will of the municipal authorities. This rule of law was firmly established with respect to billboard ordinances by the Supreme Court of South Carolina over 43 years ago in *Schloss Poster Advertising Company, Inc. vs. City of Rock Hill, et al.*, 190 S.C. 92, 2 S.E. 2d 392 (1939). The law established in *Schloss* is dispositive of the constitutional issue in the instant case.

In *Schloss*, the Appellant had been unsuccessful in attempting to obtain a declaration of the invalidity of the following ordinance of the City of Rock Hill:

"Hereafter it shall be unlawful to erect or maintain any billboard facing on any public street or other public place within the incorporate limits of the City of Rock Hill without having first obtained from the City Council a permit to do so."

(2 S.E. 2d at 393)

The Appellant was a non-resident corporation with its principal place of business in Charlotte, North Carolina and was engaged mainly in the business of posting and displaying advertisements on billboards. The Special Referee found that the ordinance was invalid and unreasonable on its face, and further found that the City Council had been guilty of discrimination in its enforcement because the Council had given permission to erect billboards to one S. T. Frew, the health officer of the City of Rock Hill, who operated a company entitled Rock Hill Poster and Advertising Company. Upon appeal from the Special Referee, the Circuit Court however declared the ordinance to be valid, and further declared that no constitutional right of the Appellant had been violated.

Testimony for the City tended to show that the Rock Hill City Council evaluated the following grounds in dealing with applications for billboards:

- 1) Aesthetic considerations.
- 2) Trash and debris that would collect behind the signs.
- 3) The danger occasioned by the signs.
- 4) There were already some number of signs present in the areas where further erection was sought.

The South Carolina Supreme Court unanimously reversed the Circuit Court and held the ordinance unconstitutional on its face. It wrote:



"It seems to us clear upon authority and reason that if an ordinance is passed by a municipal corporation, which upon its face restricts the right or dominion which the individual might otherwise exercise over his property without question, not according to any general or uniform rule, but so as to make the due enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void, because it fails to furnish the uniform rule of action and leaves the right of property subject to the despotic will of city authorities who may exercise it so as to give exclusive profits or privileges to particular persons.

\* \* \* \*

The ordinance before us is in no sense a zoning ordinance . . . , nor does it prescribe rules or conditions for the issuance of permits for the erection of billboards to which all persons similarly situated may conform. It does not profess to prescribe regulations for their locations, construction, or maintenance, but it commits to the unrestrained will of the city authorities, for any reason deemed satisfactory to them, the right and power to absolutely prohibit the use of property for the erection of billboards.

The ordinance in question in no way controls or guides the discretion vested thereby in the Respondents. It prescribes no uniform rule upon which the special permission of the city is to be granted. Thus the city is clothed with the uncontrolled power to capriciously grant the privilege to some and deny it to others; to refuse the application of one landowner or lessee and to grant that of another, when for all material purposes, two are applying for precisely the same privileges under the same circumstances. The danger of such an ordinance is that it makes possible arbitrary discriminations and abuses in its execution, depending upon no conditions or qualifications

whatever other than the unregulated arbitrary will of the city authorities as the touchstone by which its validity is to be tested. Fundamental rights under our government do not depend for their existence upon such a slender and uncertain thread. Ordinances which thus invest a city council with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid. The ordinance should have established a role by which its impartial enforcement could be secured. All of the authorities cited above sustain this conclusion.

The particular question in this case is whether or not the ordinance in question is a valid exercise of police power. Language better calculated to enable the city council to absolutely control the location, erection and maintenance of structures for outdoor advertising, without any reference to known rules and regulations with which all might comply if such existed, cannot well be imagined."

(2 S.E. 2d at 294-395)

The City of Columbia is in precisely the same situation as was the City of Rock Hill. That City's billboard ordinance was declared unconstitutional because it contained no standards governing the conduct of the City Council and therefore Rock Hill was ordered to permit the erection of the signs of Schloss Poster Advertising Company. The ordinance here in question also contains absolutely no standards whatsoever governing actions of the City Council of Columbia in approving the "location, size and compatibility with public safety" of off-premises commercial advertising billboards or signs. The ordinance instead vests in the City Council absolute discretion to determine what standards govern the proper location and proper size of billboards, and what standards are to be used to determine whether a billboard is compatible with the public safety.

In short, the ordinance in question commits to the arbitrary will of the City Council of Columbia, for any reason deemed satisfactory to its members, the right and power to grant or deny applications for outdoor advertising signs. As the *Schloss* case so eloquently points out, such unregulated discretion is simply improper under both the state and federal Constitutions.

The presumption that the City Council will not act arbitrarily and will exercise sound judgment and act in good faith cannot sustain an unconstitutional ordinance. Therefore, even if the City Council were to act according to entirely proper and adequate standards internally, the ordinance on its face is still void. *The ordinance* itself must contain proper standards to govern the conduct of the City Council or other bodies vested with the right to approve or deny applications for the construction of outdoor advertising signs, regardless of the actual or anticipated internal conduct of the Council. See *South Carolina State Highway Department v. Harbin* — S.C. —, 86 S.E. 2d 466, 471 (1955) ("When courts are considering the constitutionality of an act, they should take into consideration the things which the act affirmatively permits, and not what actions an administrative officer may or may not take. . . . The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion.")

Other cases confirming the same principal are legion both nationally and in South Carolina. See, e.g., *City of Florence vs. George*, — S.C. —, 127 S.E. 2d 210 (1962), *City of Darlington vs. Stanley*, — S.C. —, 122 S.E. 2d 207 (1961), *Henderson vs. City of Greenwood*, 172 S.C. 16, 172 S.E. 689 (1933), *Douglass vs. City Council of Greenville*, 92 S.C. 374 (1912), and *Yick Wo vs. Hopkins*, 118 U.S. 356 (1885).

NOW, THEREFORE, IT IS ORDERED, that Ordinance number 82-12 (codified as Section 2-2104 of the

City Code of Columbia, South Carolina) adopted by the City Council for the City of Columbia on March 24, 1982 is declared unconstitutional under the laws of the State of South Carolina and under the Constitution of the United States and is null and void.

IT IS FURTHER ORDERED, that the City of Columbia, its administrative officials, including without limitation, the Superintendent of Inspections for the City and the City Council of Columbia, are hereby enjoined from preventing in any manner whatsoever Petitioner from erecting and constructing outdoor advertising signs on the following twelve locations: 1921 Taylor Street, 7127 Sumter Street, 1819 Laurel Street, 910 Huger Street, 801 Harden Street, 600 Gervais Street, 520 Huger Street, 701 Gervais Street, 1040 Gervais Street, 1800 Block Harden Street (West Side), 5006 North Main Street and 3617 North Main Street.

IT IS SO ORDERED.

/s/ Jasper M. Cureton  
JASPER M. CURETON,  
Special Circuit Judge,  
Court of Common Pleas  
Fifth Judicial Circuit

Columbia, South Carolina

July —, 1982



**EXHIBIT 20 EXCERPT—CITY COUNCIL AGENDA**  
**(6/16/82)**  
**[PAGES C.A. APP. 2666]**

June 16, 1982

**AGENDA**

**I. PUBLIC Hearing:** Proposed Zoning Changes for Rosewood Drive Rezoning.

**II. ORDINANCES:**

**A. First Reading:**

1. Ordinance Authorizing Tax Anticipation Note

**B. Second Reading:**

1. Approval of Budget for Fiscal 1983
2. An Ordinance to Raise Revenue for the City of Columbia, S.C., for the Fiscal Year Ending June 30, 1983
3. Amending Code of Ordinances, Part I, Chapter 2, Article A, Section 1-2001 Salaries of Mayor and Council
4. Encroachment Ordinance—1200 Block Hampton Street
5. Encroachment Ordinance—805-807 Harden Street
6. Amending the Code of Ordinances of the City of Columbia, S.C., Part 6, Chapter 2, Article B, Building Code
7. Amending the Code of Ordinances of the City of Columbia, S.C., Part 6, Chapter 2, Article C, Gas Code
8. Amending the Code of Ordinances of the City of Columbia, S.C., Part 6, Chapter 2,

Official Building Code, Article D, Plumbing Code

9. Amending the Code of Ordinances of the City of Columbia, S.C., Part 6, Chapter 2, Article F, Mechanical Code
10. Amending the Code of Ordinances of the Article G, Housing Code
11. Zoning Amendment Proposals

**III. CONSIDERATION of Current Bids:**

- A. Police Department Computer
- B. Aluminum Wire

**IV. CONTRACTS:**

- A. Columbia Urban Lending Project
- B. Man-In-Washington
- C. Central Midlands Regional Planning Council
- D. Richland/Lexington Alcohol and Drug Abuse Council
- E. Community Design Center
- F. Sunna Energy, Inc.
- G. Community Relations Council
- H. Engineering Contracts (6)

**V. RESOLUTION** Establishing Just Compensation for Acquiring Easements and Authorization for Condemnation for the Bay Branch Drainage Project (Amending 8-82-13 Chapman)

**VI. ACTION** on Economic Development Commission Recommendation.

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EXHIBIT 26 EXCERPT—NOTES FROM FINANCIAL  
REPORT OF ATLANTA OUTDOOR ADVERTISING  
[PAGE C.A. APP. 2689]

Kevin Riley

From the desk of  
J. WILLIS CANTEY

504-926-1000

11/30/61

Talked to Jerry Morland, Pres of Leno  
Before Doris Pensacola's income was \$80,000  
a month. Now it is \$160,000 a month

They spent 2 1/2 million in Pensacola

In the storm - I don't know when - they  
lost 1200 boards

He said to put spacing law into effect  
500' apart.

Rebuild Reynolds and B-W showings and  
we will keep the business.

Raise prices and build singles.

He said Doris leases over all they bought  
were not excessive

Will be in N.Y. this week - visit next week

133

EXHIBIT 30 EXCERPT—NOTES FROM NAGLEY  
[PAGE C.A. APP. 2698]

543-1900

1/2/61

Called on Nagley in Spartanburg

Met Mr. Conter, Pres of N. in Spg -  
Gastonia and Asheville. They just let service  
center is moving to Kingshio.

Marshall Merchant is new Pres of Spg. Service  
Ashe. & Gastonia.

Don Dawson is lease man & good. He  
rode me around town - Plant is very good.

Richard Peck (USC grad) is Accountant -  
All offered to help us in any way.

Put in Sign ordinance as soon as possible  
1000'.

Raise rates at Best 12% in July.

Jim Filer - N.H. Sales - Nagley in Spartanburg -  
any R.R. business.

Proctor & Williamson man to call is  
Tom Hille in Louisville Ky. Their man  
on this a/c is Wayne Lamm (Spelling?)  
They get \$1500 per side on one print unit.  
They pay local owner \$200 per month.



EXHIBIT 31 EXCERPT—HANDWRITTEN NOTES  
ON DOONER  
[PAGE C.A. APP. 2703]

Talked to Jerry Marchand

1/5/81

He wanted to know how many signs  
Dooner has built.

He said he was setting 30 poles a  
week on new locations.

Jack Rone was to keep a dialogue  
with D. But he hasn't.

Agreed to tie our lawyer in with  
his.

Put in sign ordinance as quick as  
possible

EXHIBIT 35—MEMO OF CANTEY (11/3/81)  
[PAGE C.A. APP. 2709]



Brasada - 11/3/81

1. Reduce rate on signs
  2. Raise sign rents
  3. Low gear
  4. Rent office
  5. Clear from up north
  6. No way to compete with Bill Hamilton  
RTR. Fl. Agency against
  7. 28-100 along - RT Lane - RT postal
  8. 14-50 - Don - William Bubby
  9. Get your own ordinance - 500 spacing
  10. - Thired bill poster - let him
  11. - Won any Lane battle.
  12. In our favor - more bonds than he has
  13. Don try to re build - Build new
  14. Bought map in - Don Bishop
  15. Build near traffic light.
- Dooner has a lease arrangement with Magic Market  
(Mumford)
- Get ordinance
- Signs in Shop Center

EXHIBIT 43 EXCERPT—HANDWRITTEN MEMO OF  
CANTEY (12/11/81)  
[PAGE C.A. APP. 2722]

504-926-1000

12/11/81 Visited with Gerald "Jing" Marchand, Lamar Adams - Beta House  
Dinner at the building in Panama in the out and they do  
but he is in July (6-8 months).

Dinner first asked for a new bill for the 100 faces. Only  
a few were sold but he figured annual rate (12 months) X 4  
for all units. The translated ~~amount~~ into money is  
\$2400 =  $\frac{9600}{4} \times 100 \text{ signs} = 1,017,600 \text{ plus taxes}$ . They finally  
settled for \$80,000. or \$8.00 per face.

There is a list of names of Cunningham & Saled - Bob Brown  
Lee Brown - Philip Morris (Kathleen - Vachin) Chris Stander  
Philip Morris has many inspectors all over the country.

Most of the time they do not contact the plant operator.  
They have a good 12x18 printed bulletin on T-10 - \$1000 per 100  
They are a lot of 100x36 three stripes or 4.  
None of them is done.

But in opening 500' over Consider Martin

This was a contact in out building in Panama. It is the time  
Jing suggest that he longer get in touch with his longer  
a building with done.

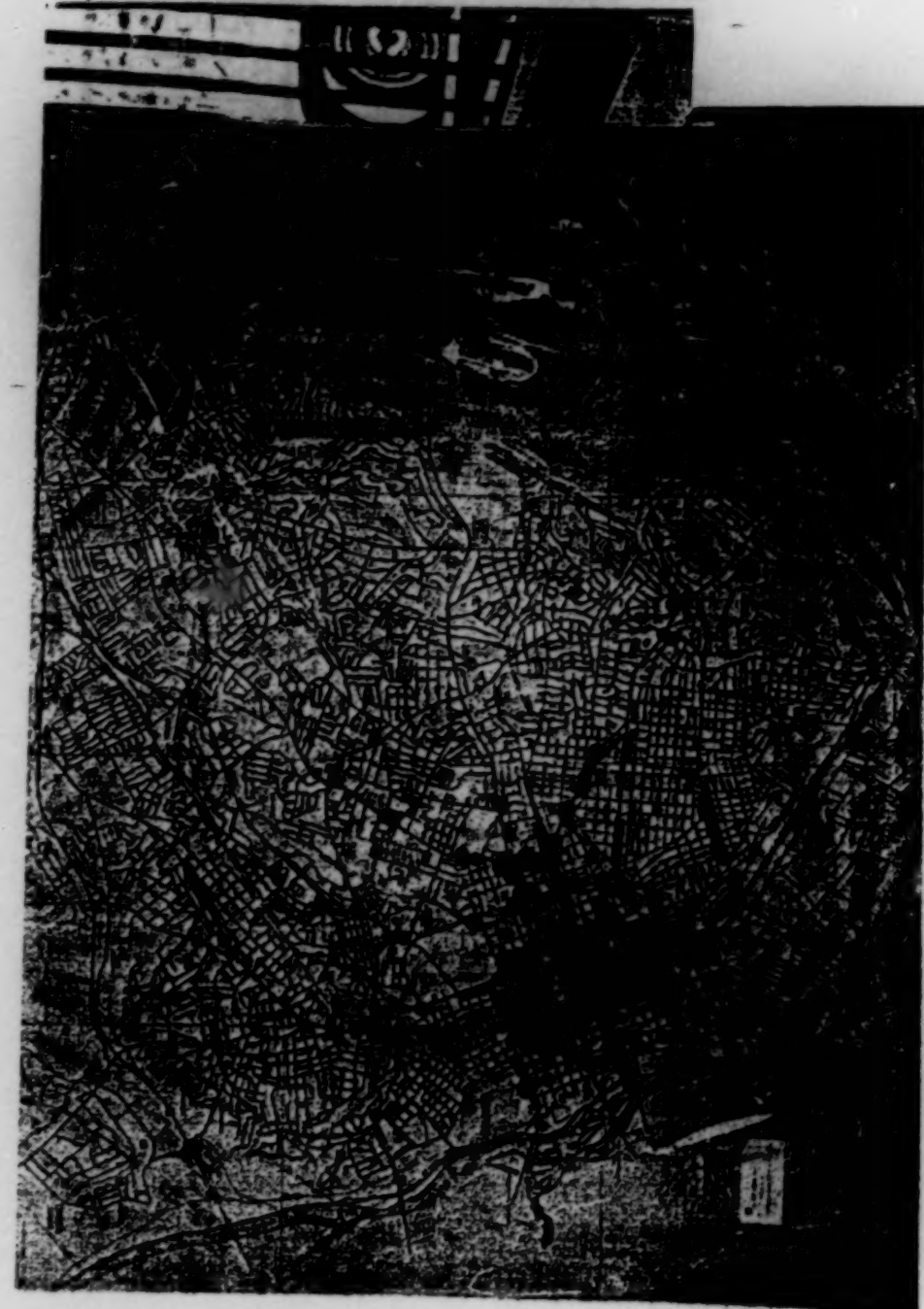
Then Lamar did not buy down excess material - it was shipped out.

Max Franklin - James Lewis Man

Jack Roine, Marchand CPA and the man who dealt with

Done in the Panama - Mobile deal. Chief financial officer  
The think Jing should will send Carl Hines to ride RTH showing  
the uses & steel supplies. The Hallway Light in Cuba.  
Gerald Long is ahead of Mary ... at RTH (at think). He has  
not and entertained both of them at Christmas & parties.

EXHIBIT 55 EXCERPT—PICTURE OF CHART/MAP  
SHOWING LOCATIONS OF OMNI AND COA  
[PAGE C.A. APP. 2757]





**EXHIBIT 58 EXCERPT—COA 1982 RATE CHART**  
**[PAGE C.A. APP. 2760]**

**Columbia, S.C.**  
**Metro Market**  
 Population: 382,000  
 Richland, Lexington Counties  
**1982 RATES**  
 EFFECTIVE 7/1/82



Market	GRP Intensity	Altiment	Reg.	Total	Cost Per Month	Avg. Cost Per Panel	TAB E.D.C.	Cost Per T. Per Day
Columbia Metro	200 GRP	38	21	(50)	\$9540.00	\$159.00	783.24	.4060
	175 GRP	34	20	(53)	\$639.00	183.00	693.60	.4151
	150 GRP	30	15	(45)	7380.00	184.00	587.43	.4187
	125 GRP	26	12	(38)	8308.00	186.00	498.33	.4219
	100 GRP	20	10	(30)	5010.00	187.00	391.62	.4264
	75 GRP	15	8	(23)	3887.00	189.00	301.98	.4290
	50 GRP	10	5	(15)	2580.00	172.00	195.81	.4392
	25 GRP	5	2	(8)	1440.00	178.00	106.71	.4498

**Columbia Metro Single Panel Rate:**

Illuminated	\$300.00
Regular	\$250.00

The above are panel costs only. The advertiser agrees to furnish, free of all costs to Columbia Outdoor Advertising, the necessary Posters (including 20% additional posters) to keep the display in first-class condition. In case of failure to furnish sufficient additional posters, no claim for loss of display will be made upon Columbia Outdoor Advertising Company.

Twelve month posting contracts earn a 10% continuity discount — except on single panels.

**8 Sheet Posters:**

\$60.00 per panel — No quantity discount Twelve month posting contracts earn a 10% continuity discount — on 8 panels or more

**Painted Rotary**

Rotation each 90 days. Copy area 14' x 48' (Bleed Face) 672 Sq. Ft. Repaint each 8 months.

12 months \$675.00	24 months \$650.00	36 months \$625.00
--------------------	--------------------	--------------------

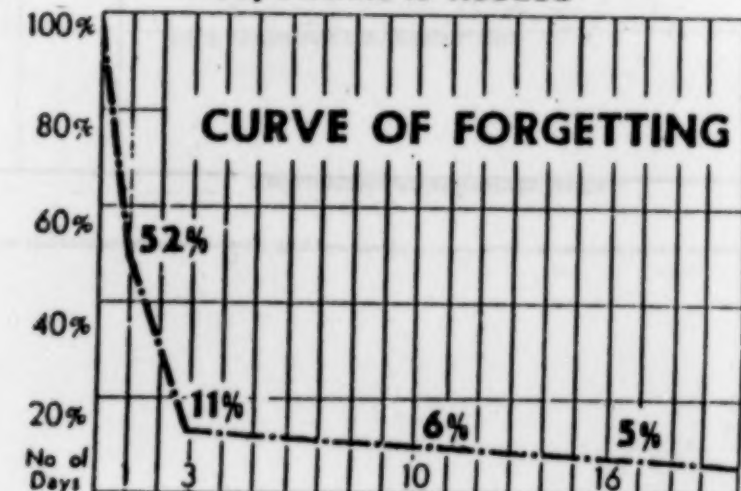
**Junior Painted Rotary**

12 months \$90.00	24 months \$80.00	36 months \$70.00
-------------------	-------------------	-------------------

**Plant Coverage — Other Markets**

Aiken, S.C.	100% 8	700.00
	50% 4	472.00
	25% 2	240.00
	Special 1	120.00
Batesburg-Leesville, S.C.	100% 4	472.00
	50% 2	240.00
	Special 1	120.00
Camden, S.C.	100% 4	472.00
	50% 2	240.00
	Special 1	120.00
Edgefield, S.C.	100% 2	240.00
	50% 1	120.00
Johnston, S.C.	100% 2	240.00
	50% 1	120.00
Saluda, S.C.	100% 2	240.00
	50% 1	120.00

**Because memories are short  
 ...repetition is needed**



—Based on a Study by Burill & Dobell

**EXHIBITS—COA INVOICES**  
**[PAGES C.A. APP. 2821, 2824-2829, 2855-2857, 2858-2859]**

**COLUMBIA OUTDOOR ADVERTISING, Inc.**

2001 HARPER ST. — P. O. BOX 4215 — PHONE 256-2462  
 COLUMBIA, SOUTH CAROLINA 29240



RECEIVED  
FROM

Mr. Paul Z. Bennett, Campaign Fund

ORDER NO.

2604 Devine Street

DATE

February 15, 1983

Columbia, SC 29205

DISPLAY BEGINS

DISPLAY ENDS

NO. PANELS	PRODUCT ADVERTISED	RATE	GROSS AMOUNT
5	30 sheet posters — PAUL Z BENNETT		\$195 00
	S. C. Sales Tax		7 80
	Shipping Charges		11 35
			\$214 15
5	Posters — PAUL Z. BENNETT (Space)		\$420 65
			\$635 00

PLEASE RETURN PINK COPY W/REMITTANCE

**COLUMBIA OUTDOOR ADVERTISING, Inc.**

2001 HARPER ST. — P. O. BOX 4215 — PHONE 256-2462  
 COLUMBIA, SOUTH CAROLINA 29240

RECEIVED  
FROM

Leo Burnett USA  
 Accounting Dept., Section B

ORDER NO. SCCOLU 01-08

Prudential Plaza

DATE March 17, 1981

Chicago, Illinois 60601

DISPLAY BEGINS

March 25, 1981

DISPLAY ENDS

April 25, 1981

NO. PANELS	PRODUCT ADVERTISED	RATE	GROSS AMOUNT
30	Posters — PHILIP MORRIS		\$3,780 00
	Less 16 2/3%		-630 01
			\$3,149 99
	Merit — New Horiz Ultra Lights		
	Virginia Slims — Red Candy		
	Location — Attached.		

PLEASE RETURN PINK COPY W/REMITTANCE



## COLUMBIA OUTDOOR ADVERTISING, Inc.

2001 HARPER ST. - P. O. BOX 4215 - PHONE 254-2462  
COLUMBIA, SOUTH CAROLINA 29240RECEIVED  
DM

Tele Job, Inc.

#9 Brookside Drive

Nestport, Conn 06880

ORDER NO. 2-349

DATE April 7, 1981

DISPLAY BEGINS April 1, 1981

DISPLAY ENDS May 1, 1981

NO. PANELS	PRODUCT ADVERTISED	RATE	GROSS AMOUNT
9	Posters - HORSE SHOE - RICHWAY		1,350 00
	Less 16 2/31		-225 00
			1,125 00
	Locations: I-126 & Highway #1, US #1 N. & Caldwell, #3 Two Notch & Road, #4 Forest Drive & Graham, #3 US #76 & Patterson, #4 1400 Gervais, #1 333 Gervais, #2 Tri-City & Jenkins, #2 Jct. Knox Abbott & #21 S., #2		

PLEASE RETURN PINK COPY WITH REMITTANCE

## COLUMBIA OUTDOOR ADVERTISING, Inc.

2015 READ STREET - P. O. BOX 4215 - PHONE 254-2462  
COLUMBIA, S. C. 29240

March 17, 1981

Pastor Advertising

MERIT &amp; VIRGINIA SLIMS

Order No. SCCOLU 01

Order Ref'd From

Leo Burnett Company, Inc.

No. of Panels 30

Date Display Commences

March 25, 1981

Date Display Ends

April 25, 1981

LOCATION	PANEL NO.	LOCATION	PANEL
MERIT - NEW MERIT ULTRA LIGHTS		VIRGINIA SLIMS - RED CANDY	
Lighted:		Lighted:	
N. Main & Railroad, #1		Piney Grove Rd. & I-26, #2	
US #21 N. & Caldwell, #4		US #1 N. & Drive In, #2	
1531 Legare, #Ind.		1500 Beltline, #2	
Harden N/O Calhoun, #1		US #76 & Petosky, #1	
Green & Railroad, #1		Willwood & Tree, #3	
Blosson & Harden, #1		1400 Gervais, #2 8165	
Assembly & BallPark, #2		Devine & Huger, #1	
Gervais & Gist, #1		Airport Rd. & I-26, #1	
US #378 & Sport Shop, #4		US #21 S. & Kaiser, #1	
Jct. US #1 & US #21 S. (Road), #2		Platt Springs Rd. & Sox, #2	
Regular:		Regular:	
Bush River & 7 Oaks, #Ind.		River Drive & Hill, #1	
Sumter Hwy & Trotter Rd., #1		Broad River & Railroad, #1	
#76 & Patterson, #3		Farrow Rd. & Bendale, #2	
US #1 S. & Lesley, #3		SC #277 & Maurice, #1	
US #1 S. & Clark, #2		Forest Drive & Ft. Jackson, #2	

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## COLUMBIA OUTDOOR ADVERTISING, Inc.

2801 HARPER ST. - P. O. BOX 4215 - PHONE 255-2482  
COLUMBIA, SOUTH CAROLINA 29202RECEIVED  
FROM

PEG/Cunningham &amp; Walsh, Inc.

ORDER NO. CP-81-174

875 N. Michigan Avenue

DATE April 7, 1981

Chicago, Illinois 60601

DISPLAY BEGINS

April 1, 1981

DISPLAY ENDS

May 1, 1981

NO. PANELS	PRODUCT ADVERTISED	RATE	GROSS AMOUNT
23	Posters - RALPH "Raleigh Lightes"		2,925 00
	Less 16 2/3%		-487 51
			2,437 49

Location list attached.

*Thank You!*

PLEASE RETURN PINK COPY WITH REMITTANCE

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## COLUMBIA OUTDOOR ADVERTISING, Inc.

2515 READ STREET - P. O. BOX 4215 - PHONE 255-2432

COLUMBIA, S. C. 29205

Date April 7, 1981

CP-81-174

RALEIGH

Advertising

Order No.

For'd From PEG/Cunningham &amp; Walsh, Inc.

No. of Panels 23

Display Campaign April 1, 1981

Date Display Ends May 1, 1981

LOCATION	PANEL NO.	LOCATION	PANEL NO.
ghted:			
cad River & Lyles, #1 82/3			
#1 N. & Bond, #1			
<del>at River &amp; Bond, #1 82/5</del>			
Line & Covenant, #1			
#1 N. & Plant, #1 ind.			
tor May 3 Square D., #2			
rt Rd. & Bulletin, #3			
38 Millwood, #2			
38 Gervais, #2			
chly & Hampton, #2			
luda & Devine, #2			
rvais & Huger, #1 ind.			
#375 & Hospital, #1			
#21 S. & Seneca, #2			
#1 Calhoun #2			
ollet:			
1 River Drive, #2			
#2 S/O 1-24, #1			
#1 N. & Postick, #1 ind.			
#1 S. Whaley, #1			
#1 S. & Cliford, #1			
#1 S. Whaley, #1 7/16 - 2/1			
#1 S. & Shul, #1			
#1 S. A/P Truck Stop, #1 ind.			



## COLUMBIA OUTDOOR ADVERTISING, Inc.

2001 HARPER ST. - P. O. BOX 4218 - PHONE 758-2482  
COLUMBIA, SOUTH CAROLINA 29209

RECEIVED  
M  
Midland Trans  
409 Piney Woods  
Columbia, SC 29210

ORDER NO.  
DATE April 21, 1981

DISPLAY BEGINS April 15, 1981 DISPLAY ENDS May 15, 1981

NO. PANELS	PRODUCT ADVERTISED	RATE	GROSS AMOUNT
10	Posters - MIDLAND TRANS OF COLUMBIA Locations: Broad River & St. Andrews, #1 Broad River & Lyles, #2 2430 Main, #1 277 & Maurice, #2 US 11N & S. Valley, #1 Sumter Hwy & Square D., #1 W. 11th & King, #2 W. 11th & Head On, #1 US 1378 & Coughman, #1nd.		1,100 00

PLEASE RETURN PINK COPY W/REMITTANCE

## COLUMBIA OUTDOOR

2001 HARPER ST. - P. O.  
COLUMBIA, SC

RECEIVED  
OM  
RJR Media Services  
P. O. Box 2737  
Winston-Salem, NC 27102

ORDER NO. R-8205665  
DATE May 10, 1982

DISPLAY BEGINS May 5, 1982 DISPLAY ENDS June 5, 1982

NO. PANELS	PRODUCT ADVERTISED	RATE	GROSS AMOUNT
30	Posters - RJR TOBACCO COMPANY Less 16 2/34		\$4,101 30 -681 56
	Location List Attached Winston - Three Men Riding Helmet Salem - Couple Girl with Hat		\$3,417 74

PLEASE RETURN PINK COPY W/REMITTANCE

OFFICIAL LIST OF LOCATIONS FROM  
**COLUMBIA OUTDOOR ADVERTISING, Inc.**  
 2415 LEAD STREET P. O. BOX 1211 PHONE 256-1462  
 COLUMBIA, S. C. 29140

Poster Advertising: **RJR TOBACCO COMPANY** Order No. \_\_\_\_\_  
 Order Rec'd from: **Winston & Salem** No. of Panels: **30**  
 Date Display Commences: **May 5, 1982** Date Display Ends: **June 5, 1982**

LOCATION	PANEL NO.	LOCATION	PANEL NO.
WINSTON - THREE MEN TIPPED HELMET TWO MEN GIRDERS		SALEM - COUPLE GIRL WITH HAT	
LIGHTED:		LIGHTED:	
Elmwood 1 Park, #2		Jct. Broad River & River Dr., #in.	
Bush River Rd. 1 Mills, #1		Bush River 1 Allied, #2	
2400 Main, #1		321 N. 1 Hopping Cr., #1	
Fronholm & Reed, #2		Parklane 4 1/2 Mills, #2	
US #1 N. 1 Alpine, #1		277 1/2 1/2	
US #1 N. 0 Railroad, #2		Two Notch & Covenant, #2	
2008 Taylor, #2		Taylor & Bull, #ind.	
Broad River 1 Meets Rd., #1		Millwood & Reese, #ind.	
US #21 S. & Frink, #2		Assembly & Church, #1	
SC #215 & ALPP #1		333 Gervais, #1	
REGULAR:		REGULAR:	
Farrow Rd. 1 Heitline, #1		Elmwood Rd. 1 Stadium, #1	
Sumter Hwy 1 Townsend, #1		Algonquin & P. 1/2, #1	
Rosewood 1 Railroad, #ind.		US #1150 & C. 1/2 Lumber, #1	
224 Hager, #1		124 1/2 1/2	
#176 & Lott, #1		10588	

**COLUMBIA OUTDOOR ADVERTISING, Inc.**

2001 HARPER ST. - P. O. BOX 4216 - PHONE 256-2482  
 COLUMBIA, SOUTH CAROLINA 29246

RECEIVED FROM: **Mr. Lloyd Hendricks** ORDER NO. \_\_\_\_\_  
**P. O. Box 728** DATE: **April 20, 1982**  
**Columbia, SC 29202**  
 DISPLAY BEGINS: **May 5, 1982** DISPLAY ENDS: **June 5, 1982**

NO. PANELS	PRODUCT ADVERTISED	RATE	GROSS AMOUNT
3	Posters - LLOYD HENDRICKS POLITICAL		\$775.00

PLEASE RETURN PINK COPY WITH REMITTANCE



Eliza Madure

1. US #10. Dotsville #2  
2. Bus at Dotsville #2  
3. US #10. Dotsville #2  
4. Bus at Dotsville #2  
5. Dotsville #2  
6. Bus at Dotsville #2  
7. US #10. Dotsville #2

Put in Li<sup>+</sup> for 1st

Bul him 12:00<sup>00</sup> on Sept 1<sup>st</sup> 82

It Name \_\_\_\_\_ Market \_\_\_\_\_ State \_\_\_\_\_  
 # \_\_\_\_\_ Station \_\_\_\_\_ Total Number \_\_\_\_\_ One  
 Land Count: Counting AM \_\_\_\_\_ to \_\_\_\_\_ Date \_\_\_\_\_ Traffic Lanes: \_\_\_\_\_ Way: Yes \_\_\_\_\_ No \_\_\_\_\_  
 Times: PM \_\_\_\_\_ to \_\_\_\_\_ Weather \_\_\_\_\_ If Machine Count: Date \_\_\_\_\_  
 Source: State \_\_\_\_\_ City \_\_\_\_\_ Other \_\_\_\_\_

TYPE OF COUNT	RECORDED COUNT	CIRC. FACTOR	12 HOUR EFFECT. CIRC.	CIRC. FACTOR	12 HOUR EFFECT. CIRC.
Machine Count	24 Hrs. <u>14.6</u>	<u>8.65</u>	<u>17.2</u>	<u>0.58*</u>	
Hand Count:	AM _____				
	PM _____	13.5*		0.5*	
Auto-Truck	Total _____				
	AM _____				
	PM _____	9		0	
Pedestrian	Total _____				

IF ONE WAY—double factor.

Grand Total

[illegible]

Primary exposure is the one with highest effective circulation

**EXHIBITS 117-120 EXCERPTS—1982, 1981, 1980 & 1983  
TAX RETURNS FOR COA  
[PAGES C.A. APP. 3010, 3034, 3065, 3092]**

**INCOME TAX SCHEDULE**

**COLUMBIA OUTDOOR ADVERTISING, INC. (57-0267855)  
COLUMBIA, SOUTH CAROLINA**

**December 31, 1982**

**CONTRIBUTIONS**

League of Women Voters	\$ 35.00
University of S. C.	250.00
Carolina Childrens Home	15.00
N.S.R.P. S.C. Affiliate	100.00
Heart Assn.	100.00
United Fund	2,075.00
Rotary Foundation and Rotary Clubs	50.00
Indian Water Courses	50.00
City of Columbia	26,100.00
Baptist Church	15.00
Miscellaneous	1.00

28,791.00

10% Contribution Limitation (23,640.32)

**CONTRIBUTION CARRYOVER TO  
DECEMBER 31, 1983**

\$ 5,150.68

**INCOME TAX SCHEDULE**

**COLUMBIA OUTDOOR ADVERTISING, INC. (57-0267855)  
COLUMBIA, SOUTH CAROLINA**

**December 31, 1981**

**CONTRIBUTIONS**

League of Women Voters	\$ 25.00
Junior Achievement	100.00
Carolina Childrens Home	300.00
Junior League	250.00
Heart Assn.	100.00
United Fund	793.25
American Cancer Society	100.00
Rotary Foundation and Rotary Clubs	25.00
Irmo Soccer Assn.	100.00
Indian Water Courses	50.00
Riverbanks Zoo	100.00
Columbia Police Club	50.00
S.C. Chamber Orchestra	50.00
Baptist Church	25.00
	<u>\$ 2,068.25</u>



## INCOME TAX SCHDEULE

COLUMBIA OUTDOOR ADVERTISING, INC. (57-0267855)  
COLUMBIA, SOUTH CAROLINA

December 31, 1980

## CONTRIBUTIONS

League of Women Voters	\$ 25.00
Columbia N.M.C.A.	75.00
Carolina Childrens Home	250.00
Planned Parenthood	20.00
University of South Carolina	250.00
United Fund	885.00
American Cancer Society	200.00
Rotary Foundation and Rotary Clubs	25.00
Irmo Soccer Assn.	100.00
Indian Water Courses	50.00
Wildwood Stables	25.00
Columbia Police Club	50.00
S.C. Chamber Orchestra	100.00
Palmetto Elks Lodge	60.00
Baptist Church	36.00
	<u>\$ 2,151.00</u>

## INCOME TAX SCHEDULE

COLUMBIA OUTDOOR ADVERTISING, INC. (57-0267855)  
COLUMBIA SOUTH CAROLINA

December 31, 1983

## CONTRIBUTIONS

League of Women Voters	\$ 25.00
University of S. C.	250.00
Carolina Childrens Home	675.00
S.C. Athletic Hall of Fame	50.00
American Cancer Society	200.00
Junior Achievement Fund	150.00
YMCA	225.00
Ronald McDonald House	100.00
City of Columbia	15,000.00
Baptist Church	20.00
S.C. State Museum	1,000.00
Allen University	200.00
Miscellaneous	350.00
	<u>18,245.00</u>
Contribution Carryover 1983	5,150.68
	<u>23,395.68</u>
10% Contribution Limitation	17,689.24
	<u><u>\$ 5,706.44</u></u>

# **EXHIBIT 130 EXCERPT—APPOINTMENT SHEET** [PAGE C.A. APP. 3169]

[Illegible]	
and representatives of downtown churches, 2nd Nazareth Baptist Church 2334 Elmwood Ave (between Oak & Waverly) re: Adopt-A-Block [Illegible]	
PM 3:30 Iris DeMates 4:00 Ralph Whitehead	
<b>SATURDAY</b>	
PM 10-4:00 p.m. Elmwood Park Tour of Homes	
<b>SUNDAY</b>	
Unscheduled	
<b>MONDAY</b>	
PM Unscheduled	
PM 4:00 Cain and father-in- law/Jim Norton 5:00 Willis Cantey investiture Hilton Field 7:00 County Convention	
<b>TUESDAY</b> Iris DeMates	
AM Unscheduled 12:30 Willis County	
PM 7:00 American Legion Reception National Guard Armory-Bluff Road 7:30 BBQ—same as above —present keys to Mrs. Walter Stolte/ Jack Flynt	
<b>WEDNESDAY</b>	
	<b>FRIDAY</b>
	AM 10:00 WELCOME—31st Southeastern Province Council, Kappa Alpha Psi Fraternity, Inc. Present key to Melvin T. Solomon, Province Polemarch (President) James Hardy— contact Carolina Inn
	PM 3:00 [Illegible]
	PM 7:15 Red Cross Convention— WELCOME Carolina Inn— Nat'l Pres. Geo. Ellsey will be there—Jasper Salmond-contact
	<b>SATURDAY</b>

AM 8:00 Council Breakfast  
9:30 Council Meeting

AM 9-11:00 Heritage Brunch  
—Hilton Head  
25 Baynard Park  
Road  
must have letter  
for admittance

**SUNDAY**

PM Unscheduled

Unscheduled

**MONDAY**

PM 7:30 Nickelodeon Party—  
The Lobby—  
922 S. Main



**EXHIBIT 134—1981-1982 PERMITS**  
**[PAGE C.A. APP. 3187]**

City of Clare  
12/22/21 to 2/2/22



12/22/77	1826 Hager St (Cory)	
	Two Alhambra & Concord (Orville & Helen)	
1/14/78	Calvin L/O Hader (Rosa) &	
	Santa Mary L/O R/O R/O (Bunnie)	
	1531 Leger (Al & Bill) & Taylor (Ker & Nora)	
1/20	Blossom & Alvin St (Gina & Walter)	
2/25	3rd Corner Oak & Hader - On Extension (Gina & K)	# I006333
3/9	403 321 N & Northway Plaza Center (Edna)	# I006577
	1003 <del>Hader</del> St - Old House (Edna)	# I006578
	703 Hader & Davis (1st & 2nd Cuts)	# I006517
3/15	1835 Carwin & Cross (COF)	# I006707
	1601 Santa Fe & Taylor (Harry & Co.)	# I006708
3/16	193 Roswell St (Tommy)	# I0066718
3/18	3315 Medical Park Rd (2100) &	# I006711
	2002 Blossom St (Edna & K)	# I006752
	700 Greenway Ferry Rd (Doris) &	# I006793
	4701 Davis St (Harry) &	# I006794
3/19	1807 Two Alhambra Rd (Tommy)	# I006811
	4779 Roswell Extension (Calvin)	# I006810
3/23	1637 Oakley & Hader St (Ker) &	# I006845
10/1	4498 Jackson Ave (Buck)	# I006853
10/3	428 Broadway St (Ker) &	# I006798
10/13	1735 Alhambra (Ker & Co.)	# I006913
10/15	2934 Davis St (COF)	# I006883
12/20	2001 Hader St (Tommy)	# I006528
	2700 Davis St (COF)	# I006528

**EXHIBIT 140—SUBSTITUTE INVOICE OF W. OUZTS**  
[PAGE C.A. APP. 3216]

COLUMBIA OUTDOOR ADVERTISING, Inc.

2001 HARPER ST. - P. O. BOX 4218 - PHONE 256-3483  
COLLEBIA, SOUTH CAROLINA 29240

RECEIVED FROM Mr. WILLIAM C. GASTON

1901 Assembly Sources

Columbia, DC 20201

ORDER NO.

DATE 2/29/84

**PLAY BEGINS**

**DISPLAY ENDS**

NO. INVOICES	PRODUCT ADVERTISING	RATE	GROSS AMOUNT
7	10-15-68 - 10-15-68 Paper 10-15-68 Printing Charge	\$2.00 \$2.00 \$2.00 \$2.00	\$2.00 \$2.00 \$2.00 \$2.00
	 <b>PAID</b> Columbia Outdoor Advertising, Inc.	\$2.00	\$2.00

Journal of Management Inquiry 22(1) 3-15

**EXHIBIT 146 EXCERPT—CAMPAIGN DISCLOSURE  
FORM, BENNETT 1983  
[PAGE C.A. APP. 3254]**

**CAMPAIGN DISCLOSURE FORM**

**SCHEDULE A  
ITEMIZED RECEIPTS**

Paul E. Bennett, CPA  
NAME OF CANDIDATE OR COMMITTEE

(Contributions from each individual or group of more than \$100)

DATE OF RECEIPT	NAME OF INDIVIDUAL OR GROUP MAKING CONTRIBUTION	AMOUNT OF CONTRIBUTION
2/28/83	Frank Blair	\$ 250.00
2/15, 3/8	J. Willis Cantey	140.00
2/2, 3/8	William C. Cantey, M.D.	115.00
2/16	J. Donald Dial	200.00
3/18	W. Russell Drake, Jr.	500.00
1/12, 1/3, 3/8	James C. Edens	1,000.00
1/27, 3/8	Mr. and Mrs. Algie B. Holland	300.00
2/18, 3/8	John B. Jordan	200.00
1/31, 3/8	Mr. and Mrs. William C. Oats	350.00
1/23, 3/8	G. T. Powers	130.00
2/17, 3/7	Dr. B. Strother Pose	200.00
1/31, 3/4	Robert L. Salmon	150.00
2/16	Harold S. Wrenn	150.00
2/17, 3/10 1/8	Paul E. Bennett Committee to Save Columbia	200.00 148.10
TOTAL (must equal the amount reported in Section 10, E. Receipts)		\$4,933.10

**SCHEDULE B  
ITEMIZED EXPENDITURES**  
(Listing of all expenditures)

DATE OF PAYMENT	NAME AND ADDRESS OF PAYEE OR CANDIDATE TO WHOM EXPENDITURES WERE MADE	PURPOSE OF EXPENDITURE	AMOUNT
1/28/83	City of Columbia	Filing Fee	\$ 90.00
2/2	US Postal Service	Bulk Mailing Permit	40.00
2/3	Oliver, Box 285, Columbia, 29202	Sticker Stickers	218.40
2/7	SC State Ethics Commission	Labels	66.00
2/11	Jack Owens Photography, 4 Newkirk Blvd.	Photographs	32.24
2/17	Columbia Outdoor, P.O. Box 4215, 29260	Billboard Advertising	675.00
2/17	Cox, Bryant & Blair, 3710 Landmark, 29204	Advertising	3,492.92
2/22	US Post Office	Postage for Bulk Mailing	404.31
2/24	G & H Mail Service, 1226 Laurel St., 29201	Preparation for bulk mailing	144.15
2/25	Crowson Stone, 819 Main St., 29201	Posters	374.40
2/28	Curry Copy Center, 1332 Main St., 29201	Printing-bulk mail letter	318.32
3/1	Crowson Stone, 819 Main St., 29201	Pamphlets	294.40
3/1	Crowson Stone, 819 Main St., 29201	Posters, Pamphlets	335.92
3/8	Star Reporter, Santee St., 29205	Advertising	48.88
3/8	US Post Office	Postage for bulk mailing	449.65
3/10	Cox, Bryant & Blair, 3710 Landmark, 29204	Advertising	1,357.66
3/11	John Durrst & Assoc., 1836 W. Buchanan, 29204	Hand Caros	120.70
3/14	Curry Copy Center, 1332 Main St., 29201	Printing-bulk Mail letter	323.72
3/14	G & H Mail Service	Preparation of bulk mailing	143.05
3/16	Crowson Stone, 819 Main St., 29201	Posters	228.80
3/17	Cash	Reimburse cash paid to poll workers	150.00
3/22	Paul E. Bennett	Reimburse cash paid for hand card distribution	165.00
3/22	Paul E. Bennett	" " " " " "	200.00
3/22	Paul E. Bennett	" " " " " "	50.00
3/22	Paul E. Bennett	For 3/1-Reimburse reception expenses	100.00
3/22	Paul E. Bennett	For 3/11-Reimburse reception expenses	100.00
Feb., Mar.	Bank Service Charges		2.48
TOTAL (must equal the amount reported in Section 11, D.)			\$9,921.00

Additional pages may be added if necessary.

**EXHIBIT 158—PROPOSED ADVERTISING  
SIGN ORDINANCE  
[PAGE C.A. APP. 3313]**

**PROPOSED ADVERTISING SIGN ORDINANCE**

The maximum display surface area of a basic advertising sign shall not exceed seven hundred (700) square feet. Extensions of up to two hundred (200) square feet are allowed on an advertising sign, but the maximum display surface area is nine hundred (900) square feet.

Only one (1) side of a double-faced sign shall be considered when computing the square footage of signs. Advertising signs shall have only one (1) sign face in any one (1) direction. There shall be no side-by-side or double decker advertising signs.

No advertising sign shall be erected within the following distances another advertising sign on the same side of the street:

1. C-3, C-4, C-5: 1,000 feet;
2. M-1, M-2: 750 feet.

Advertising signs on one side of the street shall be spaced no closer than 300 feet from that point on the direct opposite side of the same street or highway to any off-premise advertising sign on that side of the street or highway on which the point of measurement is located.

**Restricted Area.**

Subject area is the center core of the Downtown Business District and is bounded on the east by Bull Street, west by Wayne Street, north by Calhoun Street and south by Devine Street. (See attached map)

At the time of adoption of this ordinance, inventory of advertising signs will be taken. After adoption no additional advertising signs will be permitted in the









UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

Case Number: C/A 3:82-2872-0  
OMNI OUTDOOR ADVERTISING, INC.

v.

COLUMBIA OUTDOOR ADVERTISING, INC.  
AND THE CITY OF COLUMBIA

JUDGMENT IN A CIVIL CASE

[Filed Nov. 18, 1988]

- ☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ Decision by Court. This action came to hearing before the Court. The defendants' motion for judgment notwithstanding the verdict having been duly heard and granted;

IT IS ORDERED AND ADJUDGED, that the plaintiff take nothing; that this action is dismissed; and that the defendants, Columbia Outdoor Advertising, Inc. and the City of Columbia, recover of the plaintiff, Omni Outdoor Advertising, Inc., their costs of action.

ANN A. BIRCH  
Clerk

/s/ Nancy M. Harris  
NANCY M. HARRIS  
Deputy Clerk

Date: November 18, 1988

PROPOSED ORDINANCE OF MARCH 10, 1982  
[PAGE C.A. APP. 3190]

\* \* \* \*

A. *First Reading:*

1. *Billboard Construction in the area bounded by Harden Street, the River, Heyward Street and Elmwood Avenue—Rosewood Corridor area*

Upon motion by Mr. Adams, seconded by Mr. Barnes, Council voted unanimously that no billboards will be constructed in the area bounded by Harden Street, the River, Heyward Street and Elmwood Avenue or in any area where a rezoning has been or shall be proposed, including the Rosewood Corridor area, without the express prior permission of City Council.

\* \* \* \*

**TEMPORARY MORATORIUM OF MARCH 24, 1984**  
**[PAGE C.A. APP. 3616]**

**ORDINANCE**

Amending 1979 Code of Ordinances of the City of Columbia, Part 2, Section 2-2104, Off Premises Commercial Advertising.

BE IT ORDAINED by the City Council of the City of Columbia, South Carolina, this 24th day of March, 1982, that Part 2, Chapt. 2, Article E, Division X, Section 2-2104, of the 1979 Code of Ordinances of the City of Columbia be amended as follows:

**Section 2-2104. *Off Premises Commercial Advertising.***

It shall be unlawful for any person to erect within the City of Columbia any billboard or sign for off-premises commercial advertising without first obtaining an erection permit from the Building Official which may be issued only upon the approval of the location, size and compatibility with public safety by City Council after a public hearing.

This Ordinance shall become effective immediately, and shall expire 180 days from date.

Requested by:

Approved by:

/s/ Milton E. Hadley  
 Acting City Manager

/s/ Kirkman Finlay  
 Mayor

Approved as to Form:

ATTEST:

/s/ Roy D. Bates  
 City Attorney

/s/ James Cantey  
 City Clerk

Introduced: March 10, 1982  
 Final Reading: March 24, 1982

**PERMANENT ORDINANCE OF SEPTEMBER 22, 1982**  
**[PAGES C.A. APP. 3778-3779]**

**ORDINANCE**

Amending 1979 Code of Ordinances of Columbia, South Carolina, Part 6, Chapter 3, Article H, Section 6-3106 Signs permitted in commercial and industrial districts, Item (1) and adding Section 6-3109 Advertising signs

BE IT ORDAINED by the City Council of the City of Columbia, South Carolina, this 22nd day of September, 1982, that Part 6, Chapter 3, Article H, Section 6-3106 Signs permitted in commercial and industrial districts, Item (1) is amended to read as follows:

(1) Advertising signs in C-1, C-2, C-4, C-5, and Historic Districts: Advertising signs are prohibited in C-1, C-2, C-4, C-5, and Historic Districts.

BE IT FURTHER ORDAINED that Section 6-3109 Advertising signs is added as follows:

Notwithstanding any other provisions of this Ordinance:

(1) No advertising sign shall be erected or attached to, suspended from or supported on a building or structure, nor shall any existing signs be enlarged, removed, relocated, or substantially repaired (over 50% of its existing value) unless a building permit has been issued by the building inspector and is in compliance with all of the requirements governing advertising signs.

(2) All advertising signs must be in compliance with appropriate detailed provisions of the City of Columbia's building code, including being constructed so as to withstand wind pressures of 30 pounds per square foot (PSF).

(3) The maximum display surface area of an advertising sign shall be:



a. C-3: 700 square feet with 200 square foot extension.

b. M-1, M-2: 700 square feet with 200 square foot extension.

(4) Advertising signs shall have only one sign face in any one direction. There shall be no side-by-side or double-decker advertising signs.

(5) No advertising sign may be erected within the front yard setback.

(6) No advertising sign shall be erected within the following distances of another advertising sign:

a. C-3: 1,000 feet

b. M-1, M-2: 1,000 feet

There shall be no advertising sign on the opposite side of the street for a distance of 500 feet measured from the spot directly opposite from an existing advertising sign.

(7) There shall be no advertising signs mounted on the roof of any structure.

(8) Under no circumstances shall the Board of Adjustment Zoning grant any variance to the sign provision of this ordinance.

(9) Under no circumstances shall the Landmarks Commission permit a sign.

This effective date of this ordinance is September 22, 1982.

Requested by:

Approved by:

/s/ Graydon V. Olive, Jr.  
City Manager

/s/ Kirkman Finlay  
Mayor

Approved as to form:

ATTEST:

/s/ Roy D. Bates  
City Attorney

/s/ James Cantey  
City Clerk

Introduced 9/8/82

Final Reading 9/22/82

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

CITY OF COLUMBIA and  
COLUMBIA OUTDOOR ADVERTISING, INC.,  
v. *Petitioners,*

OMNI OUTDOOR ADVERTISING, INC.,  
*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

**BRIEF FOR PETITIONERS**

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*Counsel for Petitioners*



## QUESTIONS PRESENTED

1. Whether a municipal ordinance that satisfies the standard for state-action immunity articulated in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), nonetheless may come within the purview of the antitrust laws through a "co-conspirator" exception that does not require any showing of a direct financial interest by government officials but relies instead on the subjective motivations of those officials.

2. Whether a private party who successfully persuades a municipality to enact a zoning ordinance may be subjected to antitrust liability if either (a) the zoning ordinance itself is exempt from the antitrust laws, or (b) the private party utilized only legitimate lobbying methods and engaged in no bribery, coercion, or other corruption of the political process.

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## OCTOBER TERM, 1990

No. 89-1671

CITY OF COLUMBIA and  
COLUMBIA OUTDOOR ADVERTISING, INC.,  
v. *Petitioners,*  
OMNI OUTDOOR ADVERTISING, INC.,  
*Respondent.*

**On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit**

## BRIEF FOR PETITIONERS

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 891 F.2d 1127, and reprinted at Pet. App. 1a-48a. The unpublished opinion of the United States District Court for the District of South Carolina is reprinted at Pet. App. 49a-67a.

## JURISDICTION

The Court of Appeals entered judgment on December 15, 1989, and denied petitioners' petition for rehearing on February 15, 1990. Pet. App. 68a-69a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The petition for certiorari was granted on June 18, 1990.



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment, which in pertinent part provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for redress of grievances." The statutory provisions involved are sections one and two of the Sherman Act, 15 U.S.C. §§ 1, 2, which are reprinted at Pet. App. 70a-71a.

## STATEMENT

In 1982, petitioner the City of Columbia, South Carolina, enacted two ordinances to regulate billboards. First, the City established a temporary moratorium on new billboard construction. Later, the City passed permanent legislation that included billboard spacing restrictions. Petitioner Columbia Outdoor Advertising (COA) met with city officials prior to the enactment of the first ordinance and supported the spacing provisions contained in the final ordinance. COA has long been the dominant billboard operator in Columbia, and its executives were personal friends with several city officials, including the Mayor. Relying on these basic facts, a jury found that the City and COA conspired to restrain trade and monopolize billboards in the local market. The Fourth Circuit upheld that verdict, rejecting the City's claim that its conduct was protected under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and COA's claim that its conduct was protected under the "petitioning" exemption established in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).<sup>1</sup>

<sup>1</sup> The caption in this Court accurately lists all the parties before the district court at the time of judgment and before the court of appeals. The court of appeals erroneously included in its caption a third defendant, J. Willis Cantey. COA has no subsidiaries. Prior

1. The events leading up to this litigation began in 1981, when respondent Omni Outdoor Advertising (Omni) entered the Columbia billboard market, attracted in part by the City's lax zoning regulations. C.A. App. 419-20. Omni's strategy for penetrating this market involved the rapid construction of some two hundred billboards—a goal that it eventually achieved. *Id.* at 422-23, 434. In response, COA undertook an aggressive campaign of its own, modernizing its existing billboards and constructing new, state-of-the-art billboards. *Id.* at 515-16, 1171-72, 1401. As a result of this competition, the City experienced a substantial increase in billboards within a short time. *Id.* at 1419, 1877.

During this period, COA met with city officials and discussed the proliferation of billboards and the possibility of an ordinance limiting that proliferation. *E.g.*, *id.* at 2081, 2695. Others, including private citizens, city officials, and even Omni also supported zoning restrictions on billboards. *E.g.*, *id.* at 379, 1890, 2035-39, 3727-29, 3745. In early March of 1982, as citizen concern mounted, *id.* at 1878, 2114, 2164-65, the president of a neighborhood association and several of her neighbors decided to protest Omni's construction of a large billboard adjacent to a residential area of the City. *Id.* at 1856-57. They took their grievance first to the City Zoning Board of Adjustments, *id.* at 1857-58, and then, on March 9, 1982, to City Councilman Patton Adams. *Id.* at 1860. The following day, Councilman Adams introduced for first reading a proposed ordinance that would have barred billboard construction in the downtown area and the relevant neighborhood absent Council approval. J.A. 167; C.A. App. 1879-81.

to May 1, 1990, it was owned by private individuals. On that date, it was purchased by Outdoor South Limited Partnership, which in turn is composed of First Carolina Communications (as general partner) and Outdoor East Limited Partnership (as limited partner).

On March 24, 1982, the City Council passed the ordinance, as amended to impose a 180-day moratorium on the construction of billboards throughout the City, unless authorized by a permit from the Council. See J.A. 168 (text of moratorium); see also C.A. App. 1881-83.<sup>2</sup> The Council further resolved to enact a permanent, comprehensive zoning ordinance after opportunity for study and public hearings. C.A. App. 406, 1882-83. Omni thereupon filed a state court action challenging the moratorium. On July 23, 1982, the court invalidated the ordinance on the ground that the permit procedure vested too much discretion in the City Council. *Id.* at 2661-63.

In the meantime, the City Council had commissioned the Central Midlands Regional Planning Council (CMRPC) to formulate a comprehensive billboard ordinance. *Id.* at 1885.<sup>3</sup> During the five months between this commission and the enactment of the ordinance on September 22, 1982, CMRPC's recommendations were discussed at numerous public meetings. Countless other discussions took place between city officials, CMRPC personnel, and billboard operators, including representatives of Omni and COA.<sup>4</sup> The ordinance finally enacted by the

<sup>2</sup> Contrary to the court of appeals' statement, Pet. App. 15a, COA had not "topped off its [billboard] needs" prior to the moratorium's effective date. Although COA had secured several permits to construct billboards shortly before that date, the record is clear that the moratorium applied to these permits as well. C.A. App. 2167, 3771-72.

<sup>3</sup> The CMRPC is a state-authorized agency that provides planning services for four counties, Richland, Lexington, Fairfield, and Newberry, including the municipalities within those counties, in such areas as zoning, transportation, health care, and senior citizen services. C.A. App. 1940.

<sup>4</sup> The sequence of proceedings is reflected in the record as follows: C.A. App. 1956 (May 10, 1982, City Zoning Administrator meets with Omni and COA to discuss proposals for ordinance); *id.* at 1954-55, 3192 (May 12, 1982, first CMRPC proposal at City Council public meeting; Omni and COA attend); *id.* at 1956-57

City Council included billboard spacing requirements and related regulations. J.A. 169-71 (text of full ordinance). Although many features of the ordinance were supported by both Omni and COA, e.g., C.A. App. 1972-77, the specific spacing requirements conformed to COA's views and not Omni's. *Id.* at 1974 & 2646.

2. On November 11, 1982, Omni initiated this action in federal district court, alleging claims under sections one and two of the Sherman Act and under various state law theories. *Id.* at 14-31. The City moved to dismiss the antitrust counts on the ground that its actions were exempt under *Parker* and *Community Communications, Inc. v. City of Boulder*, 455 U.S. 40 (1982). J.A. 3-4. The district court denied the motion on July 11, 1983, reasoning that the *Boulder* standards for applying *Parker* to municipalities do not control when a plaintiff alleges a "conspiracy" between public and private actors and

(May 19, 1982, City Planning Commission reviews CMRPC proposal and recommends uniform ordinances for City and Richland County at public meeting; COA and OMNI attend); *id.* at 1959 (July 19, 1982, City Planning Commission reviews revised CMRPC draft at public meeting); *id.* at 1965, 2646-48 (July 21, 1982, City Council reviews revised CMRPC draft; City Council directs CMRPC to take comment from billboard industry; Omni attends); *id.* at 1967 (July 21-30, 1982, CMRPC meets with COA and Omni); *id.* at 1968 (August 4, 1982, City Council considers third CMRPC draft at public meeting); *id.* at 1971-72 (August 4, 1982, CMRPC and City Manager meet with COA, Omni and National to review draft); *id.* at 2180-86 (August 10, 1982, City Manager meets with Omni regarding proposed amendments to draft); *id.* at 1973-74 (August 16, 1982, City Planning Commission reviews third CMRPC draft); *id.* at 1974 (August 23, 1982, City Planning Commission holds special session for further review of third CMRPC draft; Omni and COA attend); *id.* at 1977 (August 25, 1982, CMRPC reports to City Council from City Planning Commission at public meeting); *id.* at 1895-98, 2115-18 (September 1, 1982, City Council subcommittee meets with COA, Omni and National); *id.* at 3201 (September 8, 1982, first reading of billboard ordinance at public meeting); *id.* at 3202 (September 22, 1982, enactment of final billboard ordinance at public meeting).



claims that the ordinances are merely "overt acts" in furtherance of that conspiracy. *Id.* at 5-6. The court also ruled that such a conspiracy could be shown by evidence of "corruption or bad faith anticompetitive actions on the part of city officials." *Id.*

At trial in January of 1986, Omni introduced no proof of "corruption." *See id.* 38-42.<sup>6</sup> Instead, it attempted to show that the City and COA acted in concert and that they did so for "bad faith anticompetitive" reasons. *Id.* at 59. In so doing, Omni relied on evidence indicating that COA's lobbying efforts were intended to limit competition, *e.g.* C.A. App. 548-51, 2704, coupled with a showing (1) that COA's Chairman and the Mayor were friends who dined together occasionally and also met to discuss the ordinances, and (2) that COA had made lawful campaign contributions to the Mayor and to several Council members. *Id.* at 2050, 2081, 2083, 3168-69; *see Br. in Opp. to Cert.* at 7, 10.<sup>6</sup>

At the close of evidence, the trial court instructed the jury that the Sherman Act "proscribes every 'conspiracy in restraint of trade or commerce' and that the distinguishing feature of such agreements is their 'direct, substantial and unreasonably restricting effect on competi-

<sup>6</sup> In fact, Omni took the position that the City's actions did not have "to be corrupt" or based on "a bad motive." J.A. 59. It expressly told the jury that "all you have to find, [is] that [the City and COA] worked together to limit the signs. If the purpose is because they think it's great, that doesn't matter." *Id.*

<sup>6</sup> In 1978, four years prior to the adoption of the zoning ordinances, COA provided the Mayor with free billboard space and its Vice Chairman gave a \$50 contribution to his campaign. C.A. App. 2051. In 1983, after the commencement of this action, COA provided City Councilman Paul Bennett with discounted billboard space and its Chairman gave a \$140 contribution to his campaign. *Id.* at 2110-11. In 1984, COA provided City Councilman William Ousta with free billboard space and its Chairman gave \$100 to his campaign. *Id.* at 2156-57.

tion and interstate commerce." J.A. 70. In addition, the court told the jury that COA's First Amendment right to petition the government would not protect anticompetitive conduct if COA had taken such actions "as a part or as the object of a conspiracy." *Id.* at 79.<sup>7</sup> The court nevertheless refused to give any instructions on the specific elements necessary for a finding of conspiracy between the City and a private party; instead, it simply indicated, in a variety of ways, that a conspiracy is an "agreement . . . to violate the law," *id.* at 71, or a "combination of two or more persons to accomplish by concerted actions some unlawful purpose," *id.* In sum, the instructions were completely circular: they told the jury that petitioning for and enacting an ordinance having anticompetitive effects is illegal if done as part of a conspiracy, and that a conspiracy is an agreement to do something unlawful.

3. The jury returned a verdict for Omni on the Sherman Act claims and the state law unfair trade practices claim. It awarded, prior to trebling, \$600,000 for conspiracy to restrain trade, \$400,000 for conspiracy to monopolize, and \$11,000 on the state claim. J.A. 119-20. On November 17, 1988, the district court granted petitioners' motions for judgment notwithstanding the ver-

<sup>7</sup> The full instruction reads:

Joint efforts truly intended to influence public officials to take official action do not violate antitrust laws, even though the efforts are intended to eliminate competition, unless one or more, and listen to this carefully, they do not violate the antitrust laws unless one or more of the public officials involved was also a participant in the alleged illegal arrangement or conspiracy.

Let me put it another way. It is perfectly lawful for any and all persons to petition their government, but they may not do so as a part or as the object of a conspiracy. Remember, a conspiracy being an agreement between two or more persons to violate the law, or to accomplish an otherwise lawful result in an unlawful manner.

J.A. 78-79; *see also id.* at 81.

dict, holding that the City and COA were exempt from antitrust liability under *Parker* and *Noerr* respectively. Pet. App. 49a-67a.

A divided panel of the Fourth Circuit reversed. The court first found that the City had enacted the ordinances pursuant to a clearly articulated and affirmatively expressed state policy, and that, therefore, the City's conduct constituted protected municipal action under *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985). Pet. App. 6a-9a. The court nonetheless held the City liable under a "co-conspirator" theory, on the ground that the jury could reasonably have found that the City acted "solely to further the anticompetitive commercial purposes of [COA]." Pet. App. 10a.\*

Next, the court ruled that COA was not protected by the *Noerr* doctrine, because its actions fell within the "sham" exception. In support of this conclusion, the court stated that COA's lobbying "was actually nothing more than an attempt to interfere directly with the business relationships of a competitor or an attempt to harass and deter Omni." Pet. App. 22a (quoting *Noerr*, 365 U.S. at 144). The court also drew the "inference[]" that COA had persuaded the City to enact and defend the initial moratorium ordinance, which was later held unconstitutional, despite the contrary advice of the City Attorney. *Id.* at 22a. Finally, the court characterized as merely "pro forma" Omni's appearances before city officials at public and private meetings to address proposed bill-

\* In reaching this conclusion, the court reviewed the evidence and held that it supported the following: (1) COA's motive for seeking an ordinance was to prevent respondent from entering the market; (2) COA's owner was a life-long friend of the Mayor and enjoyed close friendships with all four members of the City Council; (3) COA executives met with the Mayor on several occasions to lobby for the ordinance; (4) the ordinance conformed to COA's position; and (5) COA had a practice of offering free or discounted billboard space to numerous state and local officials, including the Mayor and some Council members. Pet. App. 13a-18a.

board regulations. *Id.* at 23a. For these reasons, the court concluded that Omni had been denied "meaningful access" to the relevant governmental decisionmakers. *Id.* at 22a-23a.\*

Judge Wilkins dissented. He first stated that the district court's conspiracy instructions were deficient because they permitted the jury to find liability solely on the basis of COA's personal relationships with city officials. *Id.* at 39a. He then went on to argue that, as a matter of law, the record did not justify withholding either *Parker* or *Noerr* protection: since there was not a "scintilla" of evidence of illegality or fraud in the process that led to the billboard ordinances, there was no reason to hold either the City or COA liable. *Id.* at 39a-48a.

The panel denied the City's and COA's petition for rehearing, and the full Fourth Circuit denied their suggestion for rehearing en banc by an evenly divided vote. *Id.* at 68a-69a.

\* The Fourth Circuit also rejected petitioners' arguments that Omni had failed to prove both the relevant product market and antitrust injury, Pet. App. 24a-30a, and that the jury improperly calculated damages, *id.* at 32a-37a. Finally, the court reversed the district court's judgment notwithstanding the verdict on the state law unfair trade practices claim, holding that, while "[t]here are no South Carolina cases on the point, . . . in our view, a finding of conspiracy to restrain competition is tantamount to a finding that the underlying conduct has 'an impact upon the public interest.'" *Id.* at 31a. The court thus reinstated the \$11,000 jury verdict for Omni on this claim and remanded to the district court to make findings on whether COA's "acts were willful or knowing," which would then warrant trebling the verdict. *Id.* Since the judgment on the state law claim depends solely on the Fourth Circuit's prior finding of federal antitrust liability, this Court should vacate and remand the state law claim if it reverses the antitrust judgment against COA. See Pet. App. 48a (Wilkins, J., dissenting).



### SUMMARY OF ARGUMENT

The *Parker* and *Noerr* doctrines both rest on "policies of signal importance in our national traditions and governmental structure of federalism." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 400 (1978). In this case, however, respondent and the court of appeals, by invoking the term "conspiracy," seek to transform the intersection between these two fundamental doctrines into a justification for simultaneously undoing both. In our view, that approach is misguided. Each petitioner, for related as well as for separate reasons, is entitled to an exemption from the Sherman Act on the facts presented.

1. The City of Columbia is exempt because its ordinances were clearly adopted pursuant to state statutes that contemplate potential anticompetitive effects. See *Town of Hallie*, 471 U.S. at 47; *Parker*, 317 U.S. at 352. Contrary to the Fourth Circuit's view, there is no basis for carving out a "conspiracy" exception to the *Parker-Town of Hallie* doctrine. See *Hoover v. Ronwin*, 466 U.S. 558, 579-80 (1984). The antitrust laws are neither intended nor well suited to serve as a national code of ethics for policing the motives behind state or municipal regulation that is otherwise lawful.

If, contrary to our submission, there is to be a "conspiracy" exception, it should be limited to cases where city officials (or the city itself) are shown to have a direct economic interest in the governmental regulation in question—for example, through receipt of a bribe or through financial involvement in the business being regulated. Cf. *Allied Tube & Conduit Corp v. Indian Head, Inc.*, 486 U.S. 492, 510-11 (1988). The acceptance of lawful campaign contributions or other benefits that are a routine part of the political process, on the other hand, should not be a permissible basis for a conspiracy finding.

2. COA's activities are exempt from antitrust liability for two reasons. First, if the City's actions are pro-

ected by *Parker*, it follows automatically that COA cannot be held liable. "[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability." *Allied Tube*, 486 U.S. at 499 (quoting *Noerr*, 365 U.S. at 136). See also *United Mine Workers v. Pennington*, 381 U.S. 657, 671-72 (1965).

Second, COA is independently protected by the First Amendment right to petition. That right extends to any use of lawful lobbying methods and applies to efforts to secure anticompetitive governmental action. See *Noerr*, 365 U.S. at 138-39. The Fourth Circuit's invocation of the "sham" exception to *Noerr* to support a contrary conclusion was doctrinally incorrect, see *Allied Tube*, 486 U.S. at 507 n.10, and grounded in specific considerations—such as COA's motive and the subsequent invalidation of the initial moratorium ordinance—that are plainly insufficient to overcome the right to petition.

### ARGUMENT

#### I. THE CITY'S ACTIVITIES ARE EXEMPT FROM ANTITRUST LIABILITY UNDER THE *PARKER* DOCTRINE.

The Fourth Circuit held that the City's ordinances were clearly authorized by state zoning statutes and thus met the test set out in *Town of Hallie*. This holding was obviously correct and is sufficient, by itself, to provide antitrust immunity for the City under *Parker*. Moreover, even assuming that *Parker* immunity may sometimes be denied to a municipality that has acted within the scope of a clear legislative authorization, this is not such a case. The evidence presented reveals, at most, an unexceptional and purely lawful lobbying effort by COA, and a positive response to that effort by local officials who had no financial interest in the outcome of the governmental action at issue.

**A. A Municipality Cannot Be Held Liable for Enacting an Anticompetitive Ordinance that Is Legislatively Authorized.**

1. *Parker and Town of Hallie Require an Exemption Here.* This Court in *Parker* held that the Sherman Act does not extend to restraints on trade "imposed . . . as an act of government" by a sovereign state. 317 U.S. at 352. The purpose of the antitrust laws is "to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations," *id.* at 351, not to "compromise the States' ability to regulate their domestic commerce," *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 56 (1985). This conclusion rests on the principle that, in our "dual system of government, . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker*, 317 U.S. at 351.

The Court has also made clear that state laws may render municipalities the "agents of the State under the *Parker* doctrine." *City of Lafayette*, 435 U.S. at 397. This approach "preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws." *Id.* at 415. The prevailing test for extending *Parker* protection to municipalities was established in *Town of Hallie*. Under that test, a municipality need show only that it was authorized to act pursuant to a "clearly articulated and affirmatively expressed" state policy that contemplates, at least implicitly, potentially anticompetitive effects. 471 U.S. at 44.<sup>10</sup>

<sup>10</sup> The legislature does not have to state explicitly that it intended anticompetitive effects, *Town of Hallie*, 471 U.S. at 43, compel the municipality to take the authorized action, *id.* at 45-46, or actively supervise the municipality in its regulatory activities, *id.* at 46-47.

The *Town of Hallie* test is clearly satisfied here, as the Fourth Circuit readily acknowledged. Pet. App. 7a-9a. South Carolina statutes grant municipalities plenary authority to regulate the use of land and the construction of buildings and other structures within their boundaries. S.C. Code Ann. §§ 5-23-10, 5-23-20 (Law Co-op. 1976) (excerpted at Pet. App. 7a n.2). Cities, in exercising this power, are authorized to act, *inter alia*, to "lessen congestion in the streets . . ., to promote . . . the general welfare, to provide adequate light and air[,] to prevent the overcrowding of land . . . [and] to protect scenic areas." *Id.* § 6-7-10 (excerpted at Pet. App. 7a n.2). See also Pet. App. 53a-54a. There can be no doubt that the South Carolina legislature included within this grant of municipal authority the power to restrict the use of billboards and, further, that it must have been aware that a billboard ordinance, much like zoning regulations in general, might restrict competition.<sup>11</sup>

The City's actions, having thus complied with the *Town of Hallie* requirements, cannot be found to violate the antitrust laws. This conclusion flows directly from two settled principles. First, when the *Town of Hallie* test is met, "the actions of a State's subdivisions are the actions of the State." *City of Lafayette*, 435 U.S. at 407 n.33 (emphasis supplied). Second, the antitrust laws reflect no "intent . . . to strike down the State's regulatory program imposed as an act of government."

<sup>11</sup> Any zoning ordinance limiting the creation or operation of a type of business obviously may restrict competition. A holding that the ordinances at issue here were not sufficiently authorized under *Town of Hallie* would thus call into question the validity of innumerable municipal ordinances around the country, enacted under similar general authorization statutes, that limit billboards or other business activities. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (plurality opinion) (referring to numerous state and municipal laws that limit billboards); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982) (noting long history of using zoning laws to restrict businesses near schools, churches and hospitals).



*Id.* Rather, a restraint resulting from such "valid governmental action" is protected because "under our form of government the question whether a law of that kind should pass . . . is the responsibility of the appropriate legislative . . . branch of government so long as the law itself does not violate some provision of the Constitution." *Noerr*, 365 U.S. at 136.

2. *There Is No Basis for a "Conspiracy" Exception to the Parker-Town of Hallie Doctrine.* The court of appeals sought to move beyond *Town of Hallie* by holding that a state-authorized municipal ordinance may become illegal if it is the product of a "conspiracy" between the municipality and a private business. This approach is illogical on its face. An "agreement" only becomes a "conspiracy" if it relates to some form of illegal conduct. Under *Parker*, however, a sovereign does nothing illegal by choosing to regulate the free market. It follows that an "agreement" between state or local officials and private parties concerning the passage of such regulatory legislation cannot constitute a "conspiracy." Nothing in the Fourth Circuit's analysis undermines this conclusion.

a. The Fourth Circuit began its discussion by quoting this Court's statement in *Parker* that "we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." 317 U.S. at 351-52 (citing *Union Pac. R.R. v. United States*, 313 U.S. 450 (1941)), quoted at Pet. App. 9a. The court of appeals application of this phrase, however, would effectively undo the whole *Parker* doctrine, since regulatory legislation can almost always be characterized as the product of an "agreement" between legislators and the favored private interests who lobbied for it.<sup>12</sup> Indeed, as Professors Areeda

<sup>12</sup> Congress can hardly have intended to exempt from the Sherman Act only those state actions undertaken without contact with private individuals who have a vested interest in the outcome. Thus, in

and Turner note, such a broad reading of the "private agreement" language in *Parker* would contradict the decision in that very case, which involved state regulation that authorized private price-setting and output limitations among producers and made these restraints enforceable under state law. 1 P. Areeda & D. Turner, *Anti-trust Law* ¶ 212c (1978).

The limited exception suggested in *Parker*, therefore, cannot properly be interpreted to reach circumstances where the state has "effectuated [a] clearly expressed purpose to substitute its own regulation for the action of the market." *Id.* That substitution will occur, at a minimum, whenever a state or a duly authorized municipality adopts a regulatory program that directly affects competition. See *Parker*, 317 U.S. at 352 ("The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as [a] sovereign, imposed the restraint as an act of government . . .") (emphasis supplied). Nor does the language in *Parker* relied on by the Fourth Circuit support a different view. It suggests, at most, this Court's intention not to exempt "private agreement[s] or combination[s] by others" merely because a state as operator of a business joins in the conspiracy. 317 U.S. at 352 (emphasis

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*Hoover v. Ronwin*, 466 U.S. 558 (1984), the Court rejected the argument that a state's limits on bar admissions were the product of an undisclosed anticompetitive conspiracy on the part of members of a public bar admissions committee that advised the state supreme court. It held that it would "emasculate the *Parker v. Brown* doctrine" to premise liability on "perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign." *Id.* at 580. A rule denying *Parker* protections based on "perceived conspiracies" between public officials and affected private interests in the legislative process would have an even greater effect in undoing *Parker* protections, because virtually all legislation is supported by some private interests.

supplied).<sup>13</sup> But that rationale has nothing at all to do with the very different considerations that are raised by the enactment of state or local regulatory laws.

b. Not only is the Fourth Circuit's reliance on *Parker* misplaced, but its reasons for applying a conspiracy exception to this case make no sense. The court never suggested that the record contained evidence of "any illegal conduct such as bribery, coercion, violence, kickbacks, or the like," or that "the Mayor [or] the City Council members stood to gain any personal financial advantage by passing the billboard ordinances." Pet. App. 39a (Wilkins, J., dissenting). Instead, the court deemed it sufficient that the jury could have found that the City passed the ordinances "solely to further the anticompetitive commercial purposes of [COA]." *Id.* at 10a (citation omitted). In other words, the City was held to be a co-conspirator here because its actions were not taken "for the public good." *Id.* at 5a.

Such an approach is both contradicted by this Court's decisions and indefensible in principle. In *Hoover v. Ronwin*, the Court held that "where the action complained of . . . was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action." 466 U.S. at 579-80 (emphasis supplied) (citing *Parker* and *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-61 (1977)). "The only requirement is that the action be that of 'the State acting as a sovereign.'" *Id.* at 574 (quoting *Bates*, 433 U.S. at 360).

In other contexts as well, the Court has noted that inquiries into legislative motive "are a hazardous mat-

<sup>13</sup> As noted, the Court accompanied this language with a cite to *Union Pac. R.R. v. United States*, 313 U.S. 450 (1941), a case that involved illegal rebates offered by a railroad as part of a conspiracy to divert business to a city-owned railroad terminal. As Areeda and Turner explain, "this indicates that a private price-fixing conspiracy among rival producers is not immunized because one of the producers is state owned." 1 P. Areeda & D. Turner, *supra* ¶ 212c.

ter," *United States v. O'Brien*, 391 U.S. 367, 383 (1968), and constitute "a substantial intrusion into the workings of other branches of government," *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977).<sup>14</sup> Consequently, the Court generally has held that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383, quoted in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). The only recognized exceptions to this policy are the "very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose." *O'Brien*, 391 U.S. at 383 n.30 (citing bill of attainder cases); see *Village of Arlington Heights*, 429 U.S. at 264-68 (authorizing inquiry into alleged racial animus); *Edwards v. Aguillard*, 482 U.S. 578, 586-89 (1987) (discussing secular-purpose test under the Establishment Clause).

Nothing about the Sherman Act assessment of the scope of protected state action warrants its placement into this small group of special cases. Indeed, the sheer breadth of state and local legislation affecting private economic interests is reason enough to deny courts the authority to examine the subjective motives behind such laws whenever an affected party alleges an "agreement" between public and private entities. As then-Judge Kennedy explained, "if the state action exemption is to remain faithful to its foundations in federalism and state sovereignty" the exemption cannot depend on the "alleged bad faith motivations of [government officials]." *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985).

<sup>14</sup> In *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982), for example, the Court stressed the "substantial costs" associated with inquiries into the subjective good faith of government officials. Since discretionary decisions "almost inevitably are influenced by the decision-maker's experiences, values, and emotions," such issues "rarely can be decided by summary judgment" and may lead to "broad-ranging discovery." *Id.* at 816-17.



Nor is there any justification for distinguishing municipalities from state governments in this regard, as the Fourth Circuit appeared to suggest. Pet. App. 12a.<sup>15</sup> The nature of the intrusion into governmental processes and the practical difficulty in making the inquiry are the same in both circumstances. See *Boone v. Redevelopment Agency*, 841 F.2d 886, 892 (9th Cir.), cert. denied, 488 U.S. 965 (1988); *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 234 (3d Cir. 1987). See also *Town of Hallie*, 471 U.S. at 45-47 (rejecting argument that municipalities will use delegated authority to harm competition unduly unless subjected to "state compulsion" and "active state supervision" requirements).<sup>16</sup>

c. In its opposition to the petition for certiorari, respondent took the position that the judgment against the City should be upheld because this case involves a corrupt agreement to trade favorable legislation for campaign contributions.<sup>17</sup> This belated claim, aside from contra-

<sup>15</sup> To the extent the court relied on the language in *Parker* excepting public participation in a "private agreement or combination by others for restraint of trade," 317 U.S. at 351-52 (see Pet. App. 9a-10a; *supra* pp. 14-15, that language cannot support a state/municipal distinction since it applies equally to a "state or its municipality." 317 U.S. at 351.

<sup>16</sup> The Court in *Town of Hallie* also rejected the argument that a state legislature must "expressly state . . . that the legislature intends for the delegated action to have anticompetitive effects." 471 U.S. at 43. It reasoned that "such a close examination of a state legislature's intent" would "embroil the federal courts in the unnecessary interpretation of state statutes" and "undercut the fundamental policy of *Parker*." *Id.* at 44 n.7. By the same token, Congress can hardly have intended courts to "embroil" themselves in determining the motives of municipal legislators in taking otherwise valid actions.

<sup>17</sup> See Br. in Opp. to Cert. at 3 ("The officials who ran the government of the City and the officers owning and running . . . COA had a secret, illegal and continuous agreement to utilize mutual resources, including perverted governmental powers, to benefit each other both financially and politically by excluding COA's competitors

dicting respondent's own position before the jury, see *supra* n.5, is not supported by the record, see *supra* p. 6. It also departs from the reasoning of the court of appeals. See Pet. App. 22a-23a; see also Pet. App. 43a-44a (Wilkins, J., dissenting) ("no evidence of illegal conduct, . . . [or] selfish or otherwise corrupt motive").<sup>18</sup> In any event, there is no basis for creating a "corruption" exception to *Parker*.

As early as *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), the Court recognized the principle that the validity of state legislation should not turn on a court's inquiry into possible corruption of the legislative process. In so doing, the Court noted the difficult determinations that such an inquiry would require—including (1) what type of corruption to target,<sup>19</sup> (2) what number of legislators must be affected,<sup>20</sup> and (3) what action to take if "public sentiment" in fact supports the law at issue.<sup>21</sup> These questions would be equally vexing, of course, if political corruption became a relevant factor in applying the *Parker* doctrine to otherwise valid laws. See 1 P. Areeda & D. Turner, *supra*, ¶ 204d.

and by providing unfair advertising advantages to incumbent Councilmen making them more difficult to defeat."); *id.* at 19 ("The issue of 'subjective motivations' which the Petitioners attempt to raise simply does not exist in the context of this case.").

<sup>18</sup> The majority opinion mentioned, without any particular emphasis, the evidence of legal campaign contributions made by COA to some of the officials who voted for the ordinances. Pet. App. 16a-17a. It saw this evidence as just one part of Omni's proof of an agreement between COA and the City.

<sup>19</sup> *Fletcher*, 10 U.S. at 130 ("Must it be direct corruption, or would interest or undue influence of any kind be sufficient?").

<sup>20</sup> *Id.* ("Must the vitiating cause operate on a majority, or on what number of the members?").

<sup>21</sup> *Id.* ("Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?").

In view of this well-entrenched reluctance to invalidate government action on the basis of political corruption, it seems extremely unlikely that Congress intended to achieve precisely that goal through enforcement of the antitrust laws. Certainly, there is nothing in the language of those statutes or their legislative history suggesting that Congress wanted to invalidate "corrupt" restraints while exempting precisely the same restraints when they are not based on corrupt motives. Such a far-reaching and novel national policy to invalidate state and local laws on the basis of corruption in the process through which they were adopted should not be created out of congressional silence. See *McNally v. United States*, 483 U.S. 350, 359-61 & n.9 (1987).

Purely as a matter of policy, moreover, there is no need for the Court to read a "corruption" exception into the antitrust laws. Where corrupt governmental conduct is illegal under another law, that law should provide "an entirely adequate remedy." Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach*, 53 Fordham L. Rev. 23, 66 (1984). And to the extent that the "corruption" alleged is not otherwise illegal, it would be especially inappropriate for the federal courts to begin "to promulgate standards for political behavior" under the guise of enforcing the antitrust laws. 1 P. Areeda & D. Turner, *supra*, ¶ 204a.

**B. Any Exception to the *Parker* Exemption for State-Authorized Municipal Action Cannot Sensibly Extend to this Case.**

If the Court were inclined to recognize some new exception to *Parker* as it applies to state-authorized municipal legislation, the concerns just discussed would plainly require that such an exception be clearly and narrowly defined. In our view, the only rule that is even arguably defensible would require a showing of objective facts, such as bribes or personal financial interests, demonstrat-

ing unmistakably that the relevant officials abused their public trust. Cf. *Allied Tube*, 486 U.S. at 509 (*Noerr* does not apply when "an economically interested [private] party exercises decision-making authority in formulating a product standard"). By contrast, an exception allowing juries to determine whether a city's actions were taken "for the public good," Pet. App. 5a, would effectively deter municipalities from adopting any potentially anti-competitive regulations.

The facts of the instant case illustrate the force of this position. Billboard regulations like those adopted by the City of Columbia are widespread throughout the country, for good and obvious public reasons. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. at 507-08 ("Nor can there be substantial doubt that the twin goals that the [billboard] ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals."). Indeed, specific evidence in this case indicates that, in passing the ordinances, the relevant city officials were reacting to longstanding concerns about the proliferation of billboards while also responding directly to requests from local citizens who shared those concerns. It is undisputed that the entry of Omni into the market had led to the construction of many new billboards by both Omni and COA. The initial moratorium ordinance, although held unconstitutional, simply attempted to maintain the status quo while the City could study the problem. The City immediately requested the appropriate regional planning authority to conduct a comprehensive analysis, which included extensive public participation, as a basis for developing the final, constitutionally valid ordinance.

Omni's proof of a "conspiracy" rested on evidence that COA's executives, who were friendly with local officials, sought a billboard ordinance to counter Omni's entry into the market and that they once told another potential competitor that the Mayor would be willing to support



such an ordinance at their request. Omni also showed that COA made lawful campaign contributions to some of the officials who voted for the ordinance. But there was no evidence linking those contributions to the City's actions; on the contrary, the contributions occurred either years before Omni appeared on the scene or after this lawsuit was filed.

We summarize this evidence not to suggest that it necessarily rules out the conclusion that the City acted pursuant to a desire to favor COA, pure and simple. Rather, this evidence demonstrates the problems inherent in any effort to inquire into governmental motive in the first place. Where, as here, a municipality considers regulating the market in a manner authorized by the state, the proposed regulation will generally be supported by legitimate public concerns. There may also be private entities who stand to gain a competitive advantage from the regulation and who will exercise their rights under the First Amendment to lobby for it. But such lobbying efforts should hardly become a basis for exposing the government to the risk of antitrust liability and thereby deterring it from actions it would otherwise have favored. In fact, private interests may provide needed information to the government and may also help to mobilize sufficient political support for an otherwise desirable measure. See *Noerr*, 365 U.S. at 137, 139.<sup>22</sup>

These concerns would be significantly diminished if plaintiffs alleging an antitrust "conspiracy" as a basis for invalidating an otherwise proper municipal ordinance

<sup>22</sup> There could be no more opportune time for a city to pass anti-billboard ordinances than when the largest local billboard company is supporting such ordinances. As this Court noted in *Noerr*, restricting self-interested lobbying "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." 365 U.S. at 137. After all, "it is quite probable people with . . . a hope of personal advantage who provide much of the information upon which governments must act." *Id.* at 139.

were required to demonstrate that the controlling decisionmakers either were bribed or had a personal financial interest in the matter brought before them. As we have noted, it is doubtful that the antitrust laws are a proper vehicle for cleansing the political process of these improprieties. See *supra* pp. 19-20. Nevertheless, in circumstances demonstrating such direct corruption, it can at least be said that there are concrete, objective facts to establish a deviation from the legislators' presumed attention to the public interest. A city is unlikely to be deterred from exercising its authority to regulate commerce by a requirement that it act through officials who are neither "bought" nor part of the group that stands to gain financially from the anticompetitive effects of the regulation at issue.

It bears repeating, however, that no such facts were proved below or assumed by the court of appeals. Thus, even if the Court were inclined to consider a new "corruption" exception, this case would provide a poor vehicle for doing so. It involves nothing more than garden-variety municipal legislation that benefited parties who supported the government's action. If *Parker* and *Town of Hallie* are to retain any real vitality, therefore, the City must be protected here. As the United States stated in similar circumstances, "if ordinary politics is not to be the basis for antitrust liability, then politicians who engage in it cannot become coconspirators by reaching accommodations with those who petition them." Brief for the United States as Amicus Curiae in No. 84-951, *Gulf Coast Cable Television Co. v. Affiliated Capital Corp.* at 11 (filed December 2, 1985).<sup>23</sup>

<sup>23</sup> If the Court were to disagree with our argument that it should hold for the City as a matter of law, we think a new trial would then be necessary. The judgment below cannot be affirmed under any reasonably well-defined "conspiracy" exception, because nothing in the jury instructions remotely required such a finding. See *supra* pp. 6-7.

## II. COA'S LOBBYING ACTIVITIES ARE EXEMPT FROM ANTITRUST LIABILITY UNDER THE NOERR DOCTRINE.

The judgment against petitioner COA must be reversed for two reasons. First, if the City's ordinance is protected under *Parker*, COA cannot be held liable for activity having sought or supported that ordinance. Second, even if the ordinance were not protected by *Parker*, COA's lobbying activities would be independently protected under the First Amendment. The Petition Clause of that Amendment extends to lawful lobbying methods that are used in an "attempt to persuade the legislature . . . to take a particular action with respect to a law that would produce a restraint or monopoly." *Noerr*, 365 U.S. at 136.

### A. COA Cannot Be Held Liable for Seeking or Supporting an Ordinance Protected by *Parker*.

If we are correct that the City's actions are exempt under *Parker*, then COA is likewise exempt for having sought or supported those actions. The Court has previously made clear that, "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability." *Allied Tube*, 486 U.S. at 499 (quoting *Noerr*, 365 U.S. at 136). See also *Pennington*, 381 U.S. at 671-72; *Hoover*, 466 U.S. at 597 n.23 (Stevens, J., dissenting).<sup>24</sup>

This straightforward conclusion rests on well-established congressional intent. As the Court explained

<sup>24</sup> Omni's attempt to rely on conduct of COA other than that directly related to petitioning for the ordinances, see Br. in Opp. to Cert. at 5 (citing "double billing" and "artificially low rates"), is inconsistent with the record and thus, not surprisingly, with the way in which all of the judges in the courts below understood the case. See Pet. App. 33a ("[i]n the present case, Omni claims that its losses were caused by the ordinances"); Pet. App. 4a.

in *Noerr*: "To hold that the government retains the power to act in [a] representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act." 365 U.S. at 137 (footnote discussing *Parker* omitted). Moreover, sanctioning private parties when the law in question is authorized under *Parker* would be irrational and unfair. Such an approach imposes treble damages on a private party for the continuing effects of a valid law that only the government is empowered to repeal. See 1 P. Areeda & D. Turner, *supra*, ¶ 204d.

Nor would it matter in these circumstances if, contrary to the evidence, see *supra* p. 6, COA had used lobbying methods that were outside the scope of its First Amendment right to petition. *Noerr* made this clear as well. Thus, although the Court recognized that the lobbying and public relations effort in that case "deliberately deceived the public and public officials[,] . . . that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." 365 U.S. at 145. To the contrary, a "'no-hold-barred fight' between two industries both of which are seeking control of a profitable source of income" is "commonplace in the halls of legislative bodies," *id.* at 144 (footnotes omitted); and the antitrust laws do not provide a second forum for continuing such a fight after the legislature has spoken. In short, given the "unethical" conduct that was exempted from antitrust scrutiny in *Noerr*, 365 U.S. at 140, COA's legitimate lobbying activities must plainly be protected if the City's actions are protected under *Parker*.



**B. Regardless of the City's Exemption Under *Parker*, COA's Lobbying Activities Are Protected by the First Amendment Right to Petition.**

Although COA must be exonerated if the City is, COA's claim to immunity does not depend only on the validity of the City's actions. Even if those actions are not covered by *Parker*, COA is still protected—not as a matter of statutory construction as just discussed, but because of the First Amendment. See *Noerr*, 365 U.S. at 138. Neither the Fourth Circuit's invocation of the "sham" exception to *Noerr*, nor the specific factors that the court relied on, detract from this conclusion.

1. *The First Amendment Protects COA's Activities.* The First Amendment expressly guarantees the people's right to "petition the Government for a redress of grievances." That right, for reasons too obvious to belabor, is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). Indeed, the right has long been recognized as "implicit in '[t]he very idea of government, republican in form.'" *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)). This fundamental right covers COA's activities in this case. Neither the means used by COA nor the ends it pursued run afoul of the First Amendment.

To begin with, COA's methods were all lawful, well-recognized lobbying techniques, traditionally used in legislative battles. Thus, COA's principals were charged with being friends with the Mayor, meeting with city officials at opportune times, and making campaign contributions. None of these activities was barred by any other law. Indeed, each is independently protected by the other clauses of the First Amendment. See, e.g., *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1396 (1990) ("the use of funds to support a political candidate is . . . 'political expression at the core of our electoral

process and of the First Amendment freedoms'") (internal quotations omitted) (citations omitted); *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (right to associate with governmental officials). Such activities do not lose their constitutional protection when they are employed in a successful petitioning effort. On the contrary, "[i]t was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights . . . ." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Much like the means, there is nothing about the ends pursued by COA that could justify taking away its constitutional protection. Even assuming the governmental actions it sought turned out not to be protected by *Parker*, that would provide no basis to penalize COA. Mere advocacy of illegal conduct remains protected under the First Amendment unless it constitutes "incitement to imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam). Nothing here satisfies that demanding standard. Moreover, any rule tying the liability of those who petition government to the ultimate validity of a statute they support would unduly chill the exercise of First Amendment rights. *In re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568, 584-85 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982). See generally *New York Times v. Sullivan*, 376 U.S. 254, 269-72 (1964).

2. *The Fourth Circuit's Reliance on the Sham Exception to Noerr Was Misplaced.* Despite the fact that COA's lobby activities were indisputably genuine, the court of appeals held that they fall within the "sham" exception to *Noerr*. To support this conclusion, the court relied on three considerations: first, that COA's actions were intended to harm Omni; second, that the initial moratorium ordinance turned out to be unconstitutional; and third,

that Omni's position appeared to be given only "*pro forma*" consideration by city officials. This whole analysis is flawed.

As an initial matter, this Court has recently made clear that the sham exception applies only where petitioning is not genuinely aimed at securing governmental action, but is itself used as a way to inflict direct injury on a competitor. In *Allied Tube & Conduit Corp. v. Indian Head Inc.*, the Court expressly repudiated a Ninth Circuit rule that had extended the sham exception to "the activity of a defendant who 'genuinely seeks to achieve his governmental result, but does so *through improper means.*'" 486 U.S. at 507 n.10 (emphasis in original) (quoting *Sessions Tank Liners, Inc. v. Joor Mfg.*, 827 F.2d 458, 465 n.5 (9th Cir. 1987)). "Such a use of the word 'sham' distorts its meaning and bears little relation to the sham exception *Noerr* described to cover activity that was not genuinely intended to influence governmental action." *Id.* In this case, it is undisputed that COA's petitioning activities were genuinely aimed at securing governmental action. Thus, they cannot be deemed a "sham."

More significantly, the actual factors relied on by the Fourth Circuit to hold COA liable simply do not justify any exception to *Noerr*. The first factor was that COA

had operated in the Columbia market for some forty years under existing ordinances and had not sought substantial changes until it was threatened with competition. The changes it sought obviously inured to COA's position in its contest with the incoming competition. Construed from that perspective, the facts support a jury conclusion that COA's interaction with the mayor, City administrators, and members of the Council 'was actually nothing more than an attempt to interfere directly with the business relations of a competitor' or an attempt to harass and deter Omni.

Pet. App. 22a (quoting *Noerr*, 365 U.S. at 144). This reasoning, however, reflects a serious misunderstanding

of *Noerr*. "If *Noerr* teaches anything it is that an intent to restrain trade as a *result* of government action sought . . . does not foreclose protection." Sullivan, *Developments in the Noerr Doctrine*, 56 Antitrust L.J. 361, 362 (1987) (emphasis in original). See also *United Mine Workers v. Pennington*, 381 U.S. at 670 ("Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.").

The second factor pointed to by the Fourth Circuit was that "COA instigated the Council's enactment of an unconstitutional ordinance," the purpose of which was "to delay Omni's entry into the market." Pet. App. 22a.<sup>25</sup> For the reasons discussed above, however, First Amendment protections do not disappear because a speaker urges unlawful legislative action. See *supra* p. 27. In any event, it would impose far too great a burden on the exercise of a citizen's petitioning rights if he or she could be found liable whenever a law is subsequently held unconstitutional. See, e.g., *Subscription Television, Inc. v. Southern California Theatre Owners Ass'n*, 576 F.2d 230, 233-34 (9th Cir. 1978); P. Areeda & H. Hovenkamp, *supra*, ¶ 203.2a (1989 Supp.).<sup>26</sup>

Finally, the Fourth Circuit stated that, although "Omni representatives met with City zoning officials and appeared before Council, the jury could well have be-

<sup>25</sup> There was, in fact, no evidence presented suggesting that COA had anything to do with the decision to include in the initial ordinance the provision contemplating case-by-case Council approval of billboards, which was later held unconstitutional.

<sup>26</sup> Even if COA's involvement in the initial moratorium were found to be outside the protection of *Noerr* on the ground that the ordinance was unconstitutional, COA's support of the second, *permanent* ordinance certainly would be exempt from antitrust liability since the validity of that ordinance has never even been challenged. The later ordinance caused a substantial part of the injury alleged by Omni, C.A. App. 1235-43, and thus the verdict cannot be supported on the basis of the first ordinance alone.



lieved that this was not truly meaningful access but merely a *pro forma* recognition of proponent views." Pet. App. 23a. To support this view, the court cited *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972), in which this Court had stated that an effort to "harass and deter respondents in their use of administrative and judicial proceedings" might have some bearing on allegations of a sham. Unlike that case, however, there is no indication here that COA interfered with Omni's access to government officials. On the contrary, the record is clear that Omni met with the CMRPC officials and City Council members on numerous occasions. See *supra* p. 4 & n.4.

Moreover, even assuming that one could infer that Omni's meetings with city officials were "*pro forma*" in light of the City's final action, Pet. App. 23a, that quality is inherent in the nature of the legislative and executive processes. As Justice Holmes explained, "[g]eneral statutes within the state power are passed that affect the persons or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). In that fundamental respect as well, therefore, this case differs from the judicial and administrative access issues to which this Court alluded in *California Motor Transport*. While entirely different "due process" standards may appropriately apply to adjudicative proceedings, the refusal by city officials "to listen to or respond to" Omni's concerns provides no basis for imposing liability on COA. *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984); see *California Motor Transport*, 404 U.S. at 513-14 (distinguishing legislative and executive processes from judicial and administrative processes).

In sum, nothing in the Fourth Circuit's analysis undermines the conclusion that COA's lobbying activities were fully protected by the First Amendment. Under no view, therefore, can those activities be made the basis for an antitrust violation.<sup>27</sup>

### CONCLUSION

The judgment of the court of appeals should be reversed as to both petitioners.

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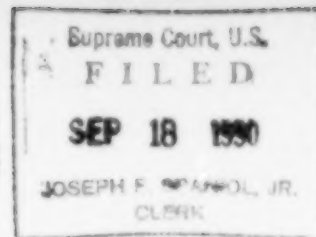
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<sup>27</sup> Although we think it is clear that judgment must be entered for COA, at a minimum a new trial is necessary. For the reasons already discussed, the jury instructions on *Noerr*, see *supra* pp. 6-7, to which COA and the City objected, J.A. 109-12, were woefully inadequate.

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No. 89-1671



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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1990

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CITY OF COLUMBIA and  
COLUMBIA OUTDOOR ADVERTISING, INC.,  
Petitioners,  
vs.  
OMNI OUTDOOR ADVERTISING, INC.,  
Respondent.

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RESPONDENT'S BRIEF

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RESTATED QUESTIONS PRESENTED

1. Does a jury verdict establishing economic injury to Respondent caused by subversion or circumvention of municipal government process sustain a judgment against the Petitioner corporation and/or municipality under the co-conspirator exception to Parker v Brown, and/or the sham exception to Noerr-Pennington?
2. Does a jury verdict establishing economic injury to Respondent caused by corruption of municipal government process sustain a judgment against the Petitioner corporation and/or municipality under the co-conspirator exception to Parker v Brown and/or the sham exception to Noerr-Pennington?



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On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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The Petition for a Writ of Certiorari did not cite to or make reference to the First Amendment to the Constitution, although Petitioners now attempt to rely upon it. (Pet. Brief at 2).

### STATEMENT

This case was tried under the antitrust laws of the United States based upon the actions taken by Columbia Outdoor Advertising, Inc. (COA) to keep and further its monopoly power in the City of Columbia, South Carolina. Central to COA's illegal activities was a pre-1981 secret agreement between COA and the City of Columbia to the effect that the City and COA would use their respective powers to ensure COA favored City Council members as it kept its monopolist position in the Columbia outdoor advertising market. OMNI in both late 1981 and early 1982 tried to enter the Columbia market only to have COA and the City rise up against it at every turn leaving OMNI ruined and COA as the monopoly billboard power in the Columbia market.

The City now wants to say that they have immunity to conspire and to follow a proven course of action to ruin OMNI and protect COA. COA wants to say it can with immunity conspire with the City, steal sign locations and generally use its agreement with the City and its monopolistic powers to ruin OMNI. No such immunity under any doctrine is recognized or warranted.

#### 1. The Verdict.

After hearing fifteen (15) days of testimony and reviewing over 220 exhibits, and after receiving instructions on the law, to which no proper or relevant objections were made by Petitioners, a jury of twelve returned a unanimous verdict in favor of Respondent as follows:



"Do you find that the Defendants, Columbia Outdoor Advertising, Inc., and the City of Columbia conspired in restraint of trade against the Plaintiff, OMNI Outdoor Advertising, Inc. Answer: Yes." (Court of Appeals Joint Appendix [Tr.] at 2502).

"Do you find that the Defendants, Columbia Outdoor Advertising, Inc., and the City of Columbia conspired against the Plaintiff, OMNI Outdoor Advertising, Inc., to monopolize the outdoor advertising market in Richland and Lexington Counties? Answer: Yes." (Tr. at 2502 - 2503).

The jury went on to render general verdicts against COA as follows:

Count I: \$600,000 actual damages<sup>1</sup>  
Count II: \$400,000 actual damages<sup>1</sup>  
Count III: \$ 11,000 actual damages<sup>2</sup>

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<sup>1</sup> The jury was also instructed on monopolization and attempted monopolization; see J.A. \_\_\_\_ [Tr. at 2497-9, -30 to 36 (esp. 33), -37 to 42 (esp. 41)]. The jury was instructed that a finding of monopolization or attempted monopolization could rely solely upon the actions of Columbia Outdoor Advertising, Inc. ("COA"). *Id.* at -33, -41. It thereafter returned a general verdict on Count II, which was the conspiracy to monopolize, attempted monopolization and monopolization count, in the amount of \$400,000.00. Findings of conspiracy to monopolize, attempted monopolization and monopolization are all therefore embraced in the jury's general verdict on Count II. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962). No issue regarding the attempted monopolization and monopolization aspect of Count II is before this Court. Therefore, the verdict on that count, with trebling and interest, rests equally upon grounds not challenged before this Court and should not be disturbed. *Id.*

<sup>2</sup> The jury found that the Petitioners violated the South Carolina Unfair Trade Practices Act and awarded \$11,000.00 for that violation. The Fourth Circuit reinstated this verdict also, instructing the District Judge to exercise his discretion pursuant to law regarding trebling and attorney's fees. Since this was clearly an authorized verdict under South Carolina law (See Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc., 294 S.C. 169, 363 S.E.2d 390 (Ct. App. 1987) (outdoor advertising industry was not exempted from S.C. Unfair Trade Practices Act, which clearly provided

With the rendering of the jury verdict, it is clear that all disputed questions of fact have been resolved in Respondent's favor.<sup>3</sup> Courts reviewing a jury verdict therefore take as true all evidence for the prevailing party, make all reasonable inferences favoring the prevailing party that are allowed by the jury instructions, and disregard all countervailing evidence. Sunkist, 370 U.S. at 25-27; Gold v National Savings Bank, 641 F.2d 430, 434 (6th Cir. 1981); Schultz and Lindsay Construction Co. v Erickson, 352 F.2d 425, 430 (8th Cir. 1965).

In reviewing jury verdicts rendered under federal statutes this Court applies the same standards:

this Court has repeatedly held that where "there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. Only when there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear."

Dennis v Denver & Rio Grande Western R.R. Co., 375 US 208, 210 (1983) (FELA case) (citations omitted). Faithful to these standards of deference to a jury's considered verdict, this Court in antitrust cases treats all disputed questions of fact as being resolved in favor of the prevailing party, Texaco, Inc. v Hasbrouck, \_\_\_\_ U.S. \_\_\_\_, 110 S.Ct. 2535, 2538 (1990); infers

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for trebling of damages), it also should stand in all events; finally, the Unfair Trade Practices matter was not brought before this Court on the certiorari petition.

<sup>3</sup> Petitioners do not challenge the sufficiency of the evidence supporting the verdict and certiorari was not granted to review the sufficiency of the evidence.



that the jury found for the prevailing party on all theories presented by the jury charges, Sunkist, 370 U.S. at 25-27; and upholds the jury's verdict absent a fatal legal error in the jury charges to which a proper and timely objection was made. Id. The Fourth Circuit majority applied these standards in reinstating the jury's verdict here. (Pet. App. 3a, 17a, 23a)<sup>4</sup>.

2. The Jury Charges.

The permissible -- indeed mandatory -- inferences from the jury verdict are drawn from the relevant jury charges. Sunkist, 370 U.S. at 25-27. The jury in this case was charged that Petitioners could be found liable if they had participated in an "illegal arrangement" or an "illegal agreement" or had agreed to "violate the law, or to accomplish an otherwise lawful result in an unlawful manner." J.A.\_\_\_\_ [Tr. at 2497-26,27]. If they found that Petitioners procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of Respondent to the market pursuant to a conspiracy, then the jury was charged that it could find liability for that reason as well; J.A.\_\_\_\_ [Tr. at 2497-29].<sup>5</sup> Finally, the jury was instructed that liability could flow

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<sup>4</sup> "Pet. App." designates pages to the Appendix to the Petition for a Writ of Certiorari.

<sup>5</sup> The Petitioners neglect to point out that the underlined material was part of this portion of the jury charges. Because of that important aspect of the jury charges, the jury was not permitted to hold Petitioners liable if it found only that COA lobbied for anticompetitive legislation.

from a finding that, pursuant to a conspiracy, Petitioners foreclosed Respondent "from meaningful access to a legitimate decision making process with regard to the ordinances in question." (*Id.*). The Fourth Circuit correctly noted there were no proper objections made to the jury instructions.<sup>6</sup> (Pet. App. 37a). Not only did Petitioners fail to follow Rule 51 of Fed.R.Civ.P. concerning objections to jury charges, *supra* n. 6, but they also proposed an alternative instruction to the District Court, which set forth basically the same legal principles as used by the District Court in its instructions, J.A.\_\_\_\_ [Tr. at 2497-26, -27, -29] and the Fourth Circuit in its reasoning. (Pet. App. 12a). Instruction #18 requested by Petitioners reads in relevant part

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<sup>6</sup> Columbia Outdoor Advertising (COA) objected to what it thought was an instruction that Petitioners could be held liable simply if COA had lobbied for anticompetitive legislation. J.A.\_\_\_\_ [Tr. at 2497-70, -71, -72]. No such instruction was given. (*See supra* n.5). The District Court responded.

I am a little concerned about the possibility that I said that lobbying itself may be a conspiracy. If I said that, I am certain that I was wrong, but if I said that activity was pursued for the purpose or in furtherance of a conspiracy, then it wasn't protected. J.A.\_\_\_\_ [Tr. at 2497, -73, -74] (emphasis supplied).

The District Court's statement makes it clear that this instruction pertained to the co-conspirator exception to *Noerr-Pennington*, which was not reached by the Fourth Circuit. (Pet. App. 24a). No issue regarding the instructions on the "sham" interpretation of Petitioners' conduct was preserved by objection. The Petitioners vigorously, indeed, opposed the idea that their conduct was in fact sham (*see*, particularly, closing arguments for the City and for COA, (Tr. at 2398-2420, 2450-2477)) and were content to let the matter go to the jury.



that it would be wrong if there were:<sup>7</sup>

illegal agreement . . . for the specific purpose of damaging OMNI's business or for the specific purpose of either obtaining a monopoly in favor of COA or maintaining such a monopoly in COA's favor.

Neither the majority nor the dissent in the Fourth Circuit found the jury instructions to be erroneous as a matter of law. The Fourth Circuit majority analyzed the instructions and verdict and drew "necessarily reflected" inferences (Pet. App. 23a) that (1) the City was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry<sup>8</sup> (Pet. App. 9a); (2) the contacts and agreements here did not relate to the purpose of attaining governmental action but solely to forcing competitors from a particular market (Pet. App. 12a); (3) "COA's interaction with the mayor, City Administrators, and members of the Council 'was actually nothing

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<sup>7</sup> At J.A. \_\_\_\_ [Tr. at 2497-73] is a discussion of Instruction #18 in District Court which is set forth in full at J.A. \_\_\_\_.

<sup>8</sup> Respondent should point out that it has taken the position that zoning laws do not constitute the kind of Town of Hallie v City of Eau Claire, 471 U.S. 34 (1985) authorization to engage in anticompetitive activity that they were found to be by the Fourth Circuit. The South Carolina Zoning Enabling Acts are neutral police power enactments that do not contemplate authorizing anticompetitive activities. Lobbying of an entity which could not legally do what was being requested would obviously not be protected activity under any reading of law. Thus, such lobbying, even if it were restricted to wholly aboveboard, legitimate activity, would give rise to liability since there would just be no Parker issue involved.

more than an attempt to interfere directly with the business relations of a competitor or an attempt to harass and deter OMNI . . . [and] that COA's purposes were to delay OMNI's entry into the market and even to deny it a meaningful access to the appropriate city administrative and legislative fora. The evidence, for example, supports inferences that COA instigated the Council's enactment of an unconstitutional ordinance even though the city attorney had advised [the Council] of its probable unconstitutionality, and that COA encouraged the City's later instruction to its attorney to proceed with litigation to stall until a moratorium could be enacted" (Pet. App. 22a); and (4) "the jury verdict . . . necessarily reflected its findings that COA's actions were a 'sham' and, construing the evidence with appropriate deference to the verdict, it supports that finding." (Pet. App. 23a).

Petitioners argued to the jury that liability could be based only upon corruption:

"Don't misunderstand this case. This case is a case where the claim is government corruption. Government corruption, an illegal arrangement, the partnership in crime. I submit to you ladies and gentlemen that just cannot be found." (Tr. at 2476-77).

"This is what the case is about; corruption" J.A. \_\_\_\_ [Tr. at 2448].

The Petitioners went on to say:

"This is a case of government corruption. No matter how you slice it." J.A. \_\_\_\_ [Tr. at 2449].

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<sup>9</sup> No charge using the word "corruption" was requested nor was any charge objected to because of a lack of a corruption test, all in violation of Rule 51 Fed.R.Civ.P.



Inferences concerning corruption, therefore, reasonably can be drawn from the jury verdict, in view of (1) Petitioners' jury argument, (2) the instructions which authorized liability if Petitioners had entered into an "illegal arrangement" or an "illegal agreement," and (3) the evidence. The Fourth Circuit itself recognized that the inferences it set forth in the majority opinion were only by way of "example." (Pet. App. 22a).

The range of inferences available from the jury verdict is revealed by the jury instruction. The jury was specifically instructed that it could not hold Petitioners liable if it found: that they had engaged in "legitimate lobbying" J.A.\_\_\_\_ [Tr. at 2497-27, -28, -29]; "[j]oint efforts truly intended to influence public officials to take official action" J.A.\_\_\_\_ [Tr. at 2497-26], or "concerted . . . effort[s]... genuinely to influence public officials," J.A.\_\_\_\_ [Tr. at 2497-25]. Thus the jury's general verdict cannot, under any circumstances, give rise to inferences that the jury premised Petitioners' liability on any of these "legitimate" activities. Indeed, Petitioners' closing arguments made it clear that anything short of corruption was "legitimate."

The jury was instructed that it could hold Petitioners liable if it found the following:

- i. an "illegal arrangement" or "illegal agreement" J.A.\_\_\_\_ [Tr. at 2497-26, -27].
  - ii. efforts by Petitioners to "violate the law, or to
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accomplish an otherwise lawful result in an unlawful manner" J.A.\_\_\_\_ [Tr. at 2497-26].

- iii. "procure[ed] and [brought] about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of the plaintiff" to the market pursuant to conspiracy. J.A.\_\_\_\_ [Tr. at 2497-29].
- iv. a conspiracy between the Petitioners "with the intent to foreclose the [Respondent] from meaningful access to a legitimate decision making process with regard to the ordinances in question" J.A.\_\_\_\_ [Tr. at 2497-29].

Given the jury's general verdict, the District Court's instructions and the Petitioners' jury argument, it is only reasonable to infer that the jury could have found that Petitioners had participated in, for example, an "illegal agreement," "illegal arrangement" and/or "efforts to violate the law, or to accomplish an otherwise lawful result in an unlawful manner." Texaco, 110 S.Ct. at 2538; Cf. Sunkist, 370 U.S. at 25-27. Embraced within such an "illegal agreement" or "illegal arrangement" would be, for example, bribery, coercion and/or kickbacks. Similarly, the jury verdict means that the jury could have inferred personal financial advantage to both COA and the City officials involved, and selfish or otherwise corrupt motives on the part of all Petitioners. Equally within the scope of an "illegal arrangement" or "illegal agreement" would be a finding by the jury of a direct link between what the Petitioners would now call "campaign contributions" (of free or reduced cost, strategic billboard space not reported on campaign contribution forms or on income taxes) and the City's actions. Necessarily, however, the jury's verdict means that the jury found that there was no "legitimate lobbying" in Petitioners'



activities.

All of these inferences from the jury's verdict, as well as others expressly drawn by the Fourth Circuit majority, would have been equally permissible under the instructions requested by the Petitioners. These requested instructions, like the ones given to the jury by the District Court, would have held Petitioners liable for an "illegal agreement" aimed at anticompetitive objectives.

Under Texaco and Sunkist, Respondents are entitled to all of these inferences under the charge and verdict, and under the proof made. All of the scenarios under which the jury was authorized to hold Petitioners liable, moreover, were consistent with Federal antitrust law. Sunkist; see infra at p.29. In any event, Petitioners have lost any basis to challenge the jury charges that authorized these alternative bases for liability, both through their failure to make a timely and proper objection, and through their request for instructions indistinguishable from the law as charged to the jury. See supra nn. 1, 5-6 and infra at p.27-29.

### 3. The Evidence.

The proof paints a picture that even the dissent in the Fourth Circuit characterized as not being a model for a civics class, and which the jury reasonably found painted a picture of substantial local governmental misconduct resulting in injury to competition and to OMNI. Although the issue is not before this Court, see supra n.3, there is no question but that there is sufficient evidence to support each of the inferences yielded by the jury's verdict.

This is not a case simply about the enactment of two anticompetitive ordinances. Nor is it a case about "legitimate" legislative lobbying. This is a case in which the City of Columbia and COA had a longstanding agreement that the City and COA would each use their respective power and resources to protect against all comers COA's monopoly position in the Columbia market. In return, City Council members received advantages made possible by COA's monopoly.

This agreement was carried out by the City harassing COA's new competition (OMNI); by the City threatening OMNI; by the City allowing COA sign locations while shutting down Columbia to OMNI; by the City threatening and passing moratoriums known to be unconstitutional but asked for by COA; by the City and COA's continuing frivolous litigation involving OMNI purely for delay; by the City giving COA secret inside information as to actions it was about to take; by the City's allowing COA to tailor an ordinance for the City to pass; by excluding OMNI from any legislative process; by COA's interfering with OMNI's receipt of business goods necessary for its operations; by allowing COA tax advantages to the detriment of the City; and by COA's stealing signs from one customer to give to another customer, including politicians.<sup>10</sup>

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<sup>10</sup> A conspiracy, of course, is a partnership, and an overt act of one partner may be the act of all without any new agreements specifically directed to that act. U.S. v Socony Vacuum Oil Co., 310 U.S. 150 (1940), reh'g. denied, 310 U.S. 658 (1940).



Petitioners do not mention the fact that in 1980 COA and the City clearly entered into an agreement whereby the City and COA would do whatever it took to keep COA's competitors out of Columbia. In return COA gave special and beneficial treatment to City officials in their races for City Council. This included free or discounted billboard space as well as strategic and/or stolen billboard locations.

In 1980 another billboard operator, Robert O. Naegele, thought about coming into Columbia because of COA's very dilapidated and outdated plant. (Tr. at 3602-3605). In response to the Naegele threat in 1980 COA got an agreement with the City to pass a restrictive billboard ordinance at any time COA needed it. Mr. Cantey, COA's owner, wrote in a letter:

The Mayor of Columbia and the four councilmen are very good friends of ours. I discussed your suggestion with the Mayor about reworking our existing sign ordinances and he promptly said, "no problem." My son Jim has begun a study to determine exactly what restrictive measures we should request. (Tr. at 2704) (See also J.A. \_\_\_\_ [Tr. at 548-549]).

When confronted with this letter Mr. Cantey said:

You know why I did that? To keep Mr. Naegele out. He was buying everything, Greenville [sic], Spartanburg, Gastonia, Greensboro, Ashville [sic], right all over me. Dooner wasn't even in it. J.A. \_\_\_\_ [Tr. at 549].

The jury had ample basis to find an illegal agreement between the City and COA to give COA whatever protection it needed.

In early Fall of 1981 Mr. William Dooner organized and started an outdoor sign company called OMNI. (Tr. at 286). Before then, Mr. Dooner had thought that Columbia would be a good market. (Tr. at 213). Mr. Dooner and his associates made an extensive study of

the Columbia market and concluded that COA, which completely controlled the Columbia market, had an inferior plant. (Tr. at 420, 645-647). They also determined that the regulations and zoning controls were unrestrictive so as to allow them to compete with COA. J.A. \_\_\_\_ [Tr. at 213]. With this information, OMNI entered the Columbia market in the Fall of 1981 with a planned leasing effort.

When OMNI decided to enter the Columbia market, COA was in a secure, monopoly position in the outdoor advertising market. (Tr. at 222, 301, 1511). It owned 95% of the outdoor advertising signs in the Columbia market (Tr. at 702).

Once the officers of COA got wind of OMNI's plan, Mr. W. Cantey made trips to investigate how COA could use its agreement with the City to sabotage and stop OMNI. He traveled to Baton Rouge, Louisiana, and Pensacola, Florida. (Tr. at 551, 2710). After discussing COA's competitive situation with his outdoor advertising friends, Mr. W. Cantey wrote in memo after memo that the way to stop OMNI was to call upon COA's agreement with the City for a city moratorium on signs and then get a city ordinance controlling the location of signs so as to allow COA's signs and no one else's. These memos show as follows:

Memo dated 11/3/81 - Pensacola trip

"Get your own ordinance - 500 spacing" "Get city ordinance."

J.A. \_\_\_\_ [Tr. at 2709].

Memo dated 12/11/81 - visit with Gerry Marchand

"Put in spacing 500' now." "Consider Moratorium."



(Tr. at 2722).

Memo regarding visit with Naegele in Spartanburg

"Put in sign ordinance as soon as possible. 1,000'."

J.A. \_\_\_\_ [Tr. at 2698].

Memo dated 1/5/82 regarding a conversation with Gerry Marchand

"Put in sign ordinance as quick [sic] as possible."

J.A. \_\_\_\_ [Tr. at 2703].

Mr. W. Cantey was also told to raise COA's rates by at least 12% in July of 1982. J.A. \_\_\_\_ [Tr. at 2698]. COA's rates were raised. (Tr. at 1484, 1532, 1810). Customers of OMNI were told by COA that OMNI was a "fly by night outfit." (Tr. at 508). Additionally, prices were cut and free space given in order to stop OMNI. (Tr. at 1091). One COA official was quoted as saying, "Don't just get 30 day contracts." He explained that he would give away contracts, if the customers bought the paper, just to get the second month of business. (Tr. at 822).

The jury consequently had ample basis to find that COA called upon its 1980 secret anticompetitive agreement with the City in order to illegally stop OMNI. Measures were chosen which would damage OMNI but not COA<sup>11</sup>. (Tr. at 1088).

The jury also considered evidence of the behavior of the Mayor and City Council, which amply supported a finding that they carried

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<sup>11</sup> Distribution of the sign locations is paramount. (Tr. at 195) As Mr. W. Cantey noted, the more good sites a company has, the more bad sites it can support. (Tr. at 1175) Coverage in Columbia is crucial. (Tr. at 879).

out the illegal agreement to protect COA. At one City Council meeting OMNI officials were singled out and unfairly attacked by the Mayor in open session. J.A.\_\_\_\_ [Tr. at 224]. On March 24, 1982, City Council and the Mayor passed a moratorium on billboards, banning the construction of billboards within the city limits without Council's express consent. J.A.\_\_\_\_ [Tr. at 3616]. They were informed by City Attorney Roy Bates that this action was illegal. J.A.\_\_\_\_ [Tr. at 389-390]. The Council passed the moratorium nonetheless and, as was foreseeable to the Council, the State court held that their actions were unconstitutional. J.A.\_\_\_\_ [Tr. at 2658-2663]. Frivolous litigation was continued purely for delay. (Pet. App. 22a). Mr. Cantey admitted the ordinances were of benefit to COA. (Tr. at 1173).<sup>12</sup>

Immediately after the first moratorium was declared illegal City Council gave first reading to a second moratorium. J.A.\_\_\_\_ [Tr. at 299, 2649]. This had the effect of keeping OMNI's business at a standstill. (Tr. at 1255). The Mayor's direct involvement in this second moratorium is evidenced in a City of Columbia Inter Office Memo. (Tr. at 3204). Even after the judicial declaration of unconstitutionality, the City, continuing its delaying tactics, dragged its feet about permitting OMNI to construct signs for which it had already leased sites. J.A.\_\_\_\_ [Tr. at 390-391].

The final restrictive ordinance, passed on September 22, 1982, clearly protected COA. (Tr. at 338-339). This ordinance maintained

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<sup>12</sup> See Pet. App. 14a, 15a.



and strengthened COA's dominant position in the Columbia market. Before passage of this ordinance, OMNI tried to provide input into the process but was consistently thwarted. J.A.\_\_\_\_ [Tr. at 393-394], (Tr. at 830-831).

The jury also had evidence, from notes made by City officials after meetings with COA, showing that COA's demands were codified as ordinances. COA demanded that the distance between signs in M-1 and M-2 zones be increased from 750 feet to 1,000 feet, which was accordingly done. J.A.\_\_\_\_ [Tr. at 3785]. OMNI objected to having any distance requirement on the opposite side of the streets. COA indicated it had no problem with such a requirement and Council passed it. (Tr. at 2198-99). The jury also heard that the September 22, 1982, ordinance was unreasonably and unusually strict in that it was tailored to ensure that OMNI could not get necessary sign locations in the critical Columbia core area. (Tr. at 835-847). The jury also considered another memo from the City Manager to City Council illustrating unfair bias in favor of COA and how OMNI was foreclosed from access to the governmental process. (Tr. at 3804-3805).

Considerable evidence went before the jury to demonstrate that, from March, 1982, to October, 1982, overt acts were taken in furtherance of an illegal conspiracy between COA and the City. A draft of a moratorium was written by Councilman Patton Adams on the back of an agenda, not the usual way of writing ordinances, the morning of March 10, 1982, the day of the first reading of the moratorium (Tr. at 1901). That day, first reading was given to a

moratorium described in the following:

Upon motion by Mr. Adams, seconded by Mr. Barnes, Council voted unanimously that no billboards will be constructed in the area bounded by Harden Street, the River, Heyward Street and Elmwood Avenue or in any area where a rezoning has been or shall be proposed, including the Rosewood Corridor area, without the express prior permission of City Council.

J.A.\_\_\_\_ [Tr. at 3190].<sup>13</sup>

The jury could have inferred, too, that COA had planned the moratorium and had called upon its agreement with the City from the evidence that on the 9th of March, COA sought and got from the City three new sign locations of which two were in the to-be proscribed area. J.A.\_\_\_\_ [Tr. at 3187] (Pet. App. 14a). Indeed, the jury could have inferred that COA wanted, and knew it could get, more from the City because of their agreement. COA had the City pass a more restrictive moratorium. On March 24, 1982, a reworded moratorium was passed J.A.\_\_\_\_ [Tr. at 3616]. The day before the final moratorium was changed, Mr. Cantey visited his good friend the Mayor of Columbia at his office, in order to get the city wide moratorium. J.A.\_\_\_\_ [Tr. at 3169] (Tr. at 2081).

This moratorium was much more restrictive than the one given first reading on March 10, 1982. While no one took credit for these changes that obviously further protected COA (Tr. at 2190), the jury was free to infer that City Council knew that COA would receive the benefit and intended for it to do so. (Tr. 2170-74, 2190-2209). Councilman Barnes, on cross-examination, noted that

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<sup>13</sup> It is important to note that this draft of the moratorium did not cover all locations in Columbia.

the Mayor and Councilmen Adams and Bennett took an unusual and substantial interest in the moratorium and sign ordinance. (Tr. at 2252). Again COA knew of the upcoming moratorium change, while OMNI did not. - Between March 9, 1982, and March 24, 1982, COA obtained from the City ten new locations in the area to be affected by the new moratorium of March 24, 1982. J.A.\_\_\_\_ [Tr. at 3187] (Pet. App. 15a).

From evidence of other events during this period, the jury had still further basis to infer the existence and implementation of an illegal, anticompetitive agreement between the City and COA to protect COA. In a letter of February 10, 1982, Mr. Cantey threatened Mr. Dooner:

At some point I think City Council will be forced to place some type of stringent restriction on our industry.

(Tr. at 2695).

At the airport in Atlanta Mr. Cantey told Mr. Dooner that he was going to get "1,000 feet spacing." J.A.\_\_\_\_ [Tr. at 664].<sup>14</sup> He did just that.<sup>15</sup>

A review of Exhibit 21 J.A.\_\_\_\_ [Tr. at 3785] shows that City planners had suggested 750-foot spacing in the critical areas and

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<sup>14</sup>Spacing is the key to being able to compete in the Columbia market core (downtown locations). City Exhibit 19 J.A.\_\_\_\_ [Tr. at 3780] shows the small area that was open to billboards. Of course these were the main automobile traffic arteries to Columbia. OMNI's Exhibit 55 J.A.\_\_\_\_ [Tr. at 2757] shows the effect of spacing; Columbia was shut down to new billboards. Mr. Cantey knew 1,000 feet spacing would kill OMNI.

<sup>15</sup>See Pet. App. 16a.



only same side spacing. In the final ordinance, Mr. Cantey got his protection: 1,000 feet spacing and opposite side spacing of 500 feet. J.A.\_\_\_\_ [Tr. at 3785]. The jury apparently inferred that this protection was pursuant to an illegal agreement, not legitimate lobbying.

Mayor Finlay berated OMNI at meetings J.A.\_\_\_\_ [Tr. at 224, 356, 1082] and on the radio. J.A.\_\_\_\_ [Tr. at 198]. He made OMNI take down a three dimensional eagle sign, calling it an atrocity. J.A.\_\_\_\_ [Tr. at 1082]. The eagle sign said:

"Columbia Your Progress is Soaring" (Tr. at 3315). He never complained about COA's signs with a three dimensional life-size model of a man with his pants down. (Tr. at 2075-2076). When asked about this the Mayor could give no reasonable explanation. (Tr. at 2073-2076). The eagle sign advertised OMNI. (Tr. at 3315). During this period the City even took actions that allowed COA tax advantages to the City's detriment. J.A.\_\_\_\_ [Tr. at 3010, 3092] (Tr. at 1755, 1802-03).

Before the advent of OMNI, in 1979, a company offering minimal competition against COA's big signs came to Columbia. J.A.\_\_\_\_ [Tr. at 2065]. The Mayor said he got upset and wrote a memo; but the City did nothing about sign ordinances until OMNI threatened COA's monopoly. (Tr. at 2060-2066, 3786).

The day before the final moratorium, Mr. Cantey had an appointment to see the Mayor. J.A.\_\_\_\_ [Tr. at 3169]. The next day, March 24, 1982, the original moratorium was mysteriously

changed so as to be even more restrictive.<sup>16</sup> J.A.\_\_\_\_ [Tr. at 3190]. The City then went into a fast track program to pass COA's restrictive permanent ordinance. (Tr. at 1917, 2027). From this, the jury had reason to infer the existence of an illegal and anticompetitive COA-City agreement, which was confirmed by the City's failure to perform the type of study one would expect of government before enacting legislation which the City clearly knew would be anticompetitive (Tr. 2646). However, Mr. Land, a planner, recommended 1,000 feet in C-3, C-4, and C-5; 750 feet in M-1 and M-2; and with no other restrictions except to display area. (Tr. at 3606). From that point, based upon what Jim Cantey of COA had sent to City Council, the City passed an ordinance, not as the planner had recommended, but that in effect froze COA in its monopoly and killed OMNI. J.A.\_\_\_\_ [Tr. at 3313, 3785] (Tr. at 1849-1850, 2016-2220, 2189-2200). OMNI was given no input into the process; it was a closed deal, J.A.\_\_\_\_ [Tr. at 200], as the jury apparently concluded.

Mr. Cantey, in a meeting concerning the new ordinance, got mad and stormed out saying he would get Council to give him 1,000 feet spacing. J.A.\_\_\_\_ [Tr. at 354]. He did that, too. The 1,000 feet spacing closed down the Columbia core area and was the key to any ordinance intended to eliminate OMNI. (Tr. at 872).

A July 20, 1982, memo said that Mayor Finlay wanted to look at any proposed ordinance. (Tr. at 3204). There was a proposal to

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<sup>16</sup>See, Id., 14a - 15a.

limit the display area to eliminate any more painted bulletins (big signs).<sup>17</sup> (Tr. at 3696, 3783). When the final ordinance was passed, display requirements were expanded to allow for these big signs. COA was protected again. The jury apparently asked, "Why was the Mayor so interested and vigorously active at this time?" It apparently found the answer in an illegal agreement between COA and the City.

The jury also had good reason to reject the City's explanations of its actions as inconsistent. Councilman Adams had said billboards were despicable. (Tr. at 1914). The rest of Council said they were against billboards. Yet right in the middle of all this supposed concern and hatred for billboards, on June 16, 1982, upon motion by Mr. Adams, the City granted COA a zoning ordinance change in order for COA to be allowed to build one of those billboards the City so despised. (Tr. at 380, 384, 387, 1221, 1914).<sup>18</sup>

The evidence considered by the jury gave abundant reasons to determine that COA was using the power of its billboard monopoly to favor one politician, particularly an incumbent one, over another. COA gave political discounts (Tr. at 2762-2782, 2821), free advertising (Tr. at 1520), and advantageously, strategically

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<sup>17</sup>The zoning change was for a big sign, the type sign Mayor Finlay wrote a memo about in 1979. (Tr. at 3170)

<sup>18</sup>COA was even given the right to build one of those hated uni-pole signs in a historical zone. (Tr. at 1544)



located space. J.A.\_\_\_\_ [Tr. at 1690].<sup>19</sup> The jury was free to apply its common sense in understanding the importance of well-placed billboards in local elections. Certainly, there was evidence before the jury that none of the other kinds of media allowed for targeting specific areas of a city or county: not radio, not television, not newspapers, not magazines, nothing else (Tr. at 1690).

The jury apparently found, for good reason, that COA used that power in political races. In return for discounted billboards, free billboards, and strategically placed billboards, COA expected to be and was paid back by the politicians.

Mr. Cantey said when asked about charging one politician one rate and another a different rate:

Q. That's not fair, charging one nothing and other ones more than your rate card; is it?

By Mr. McDonald:

Objection as leading.

A. I don't know. Maybe he did him a favor.

Q. Maybe he did him a favor?

A. May be he did him a favor so he compensated by giving him a free board. I don't know if that happened. (Tr. at 1206).

In discussing discounted space to politicians, Mr. Cantey Heath said:

Q. You would expect her to do the favors you would want

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<sup>19</sup> COA even pasted over other ads which had been paid for so they could display advantageously located ads for their favored politicians. J.A.\_\_\_\_ [Tr. at 1690].

Lieutenant Governor Mike Daniel to do for you, too, wouldn't you?

A. I would expect her to help me if I asked for it. (Tr. at 1627).

The Mayor and the Councilmen, so the jury apparently found, agreed to help COA keep out OMNI. It was the payback COA expected for their efforts in the Mayor's and Councilmen's elections.

The picture that the jury saw also included evidence of "double billing" J.A.\_\_\_\_ [Tr. at 921] -- a practice that even Mr. Cantey of COA said was stealing. J.A.\_\_\_\_ [Tr. at 1179]. This evidence showed the jury a pattern and practice by COA to sell a prime billboard location to a national customer and then resell the same location for the same time to a local customer or politician, covering over the national customer's sign with a local customer's or politician's sign. J.A.\_\_\_\_ [Tr. at 921-22].

From all of this, and other, evidence, the jury apparently had little trouble satisfying itself that the evidence did not add up to "legitimate lobbying." Instead, it apparently viewed that evidence as establishing and showing the implementation of a secret agreement between the City and COA to protect by all means COA's monopoly from any future competition.

When challenged by the Petitioners' closing arguments to search for evidence of corruption, moreover, the jury apparently found it. There is clear evidence of corruption in the record if that be needed. The free space or discounted billboard space was received by some Council members as a campaign contribution and not reported. J.A.\_\_\_\_ [Tr. at 2760, 2821, 3216, 3254, 3256] (Tr. at

2056). The free space or discounted space given by COA was not recorded by COA as a contribution. J.A. \_\_\_\_ [Tr. 3010, 3034, 3065, 3092]. The recipients of the free or discounted billboards acted very specifically for the benefit of COA J.A. \_\_\_\_ [Tr. at 198, 224] (Pet. App. 17a). Before these actions, the City essentially had left the billboard industry (COA) alone. (Tr. at 213, 349) (See supra at p. 19). COA expected favors and help in return for their giving free or discounted strategic and/or stolen sign locations to politicians (Tr. at 1519-25, 1626-27). The jury thought the favors were returned and the actions illegal. See infra p. 39, 43.

#### SUMMARY OF ARGUMENT

1. Petitioners' conduct at trial waived the questions concerning Parker and Noerr-Pennington they seek to present to this Court. At trial, Petitioners failed to make proper objections to the District Court's legal instructions regarding the co-conspirator exception to Parker and the sham exception to Noerr-Pennington. Petitioners also waived the questions presented to this Court by requesting their own jury instruction that tracks the law as charged by District Court. Petitioners' conduct thus falls within the doctrine of City of Springfield v. Kibbe, 480 U.S. 257 (1987), in which this Court dismissed writ of certiorari as improvidently granted. Petitioners' failure to object to the relevant jury charges and their waiver of their objections through their own requested charges also mean that all potential bases for liability given to the jury are safe from legal attack or further scrutiny in this Court. Sunkist, 370 U.S. at 25-27. In any event, the jury



charges were legally correct and sustain the judgment, as shown next.

2. Subversion or circumvention of the governmental process with anticompetitive results imposes antitrust liability on both a municipality and a private party, notwithstanding Parker or Noerr-Pennington. Parker and Noerr-Pennington do not validate the forfeiture of government to private interests through an agreement to eliminate competition. Thus Parker does not validate the combined illegal conduct of elected officials and private parties, and has a "co-conspirator" exception. Similarly, Noerr-Pennington does not validate "private action" masquerading as governmental action. The doctrines expressly protect only valid governmental action. This is because a municipality has no license from the state to use its delegated powers for purely private economic purposes, and because a private agreement to use governmental powers toward that end makes the governmental process a sham. Proof that Petitioners, for example, conspired solely to further COA's commercial purposes to the detriment of competitors; that Petitioners engaged in private contacts and agreements solely to force competitors from a market and to deny Respondent meaningful access to a relevant government forum -- all as properly inferred from the jury's verdict -- thus sustains the judgment against Petitioners. The First Amendment does not extend to a conspiracy with government.

3. The relinquishment of government's fiduciary responsibility to the electorate also is corruption. If the Court, consequently,

eliminates the co-conspirator exception to Parker, and/or disallows a sham exception<sup>20</sup> to Noerr-Pennington here despite demonstrated subversion or circumvention of the governmental process, then corruption of the governmental process with anticompetitive results alternatively warrants imposing antitrust liability on both a municipality and a private party, notwithstanding Parker or Noerr-Pennington. Consistently, and as reaffirmed recently in Allied Tube & Conduit Corp. v Indian Head, 486 U.S. 492, 504 (1988), this Court has held that "one could imagine situations where the most effective means of influencing governmental officials is bribery, and we have never suggested that that kind of attempt to influence the government merits [antitrust] protection." The jury's verdict, as amplified by the jury charges, and as supported by the concededly sufficient evidence, supplies a finding of this type of corruption -- which Petitioners call "direct corruption" -- as well. Both the dissent in the Court of Appeals and the Petitioners here concede that "direct corruption" of the governmental process - - as shown, for example, by personal financial interest, personal

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<sup>20</sup> The Fourth Circuit wrote:

"In our view, the jury verdict, in light of the instructions it received from the court, necessarily reflected its finding that COA's actions were a 'sham' and, construing the evidence with appropriate deference to the verdict, it supports that finding. In view of this holding, it is not necessary to consider the issue of whether there is a co-conspirator exception to Noerr-Pennington immunity." (Pet. App. 23a, 24a).

Thus, there is no issue before this Court of whether a co-conspirator exception to Noerr-Pennington applies. See supra n. 6.

bias, bribes or other "illegal acts" -- would sustain the judgment against Petitioners. The District Court's unchallenged instructions and Petitioners' evidence put a jury finding of just such "illegal acts" by Petitioners well within the scope of the jury's verdict. Petitioners' closing jury argument invited such a jury finding. The First Amendment, moreover, does not protect the use of corrupt means to obtain governmental action.

#### ARGUMENT

##### I. SUBVERSION OR CIRCUMVENTION OF GOVERNMENTAL PROCESS SUSTAINS THE JUDGMENT

The instructions given by the District Court and the instructions acquiesced in, and requested, by Petitioners clearly allow the jury verdict to stand. Furthermore, the principles of law as to both Parker and Noerr-Pennington as set forth by the Fourth Circuit are correct. Subversion or circumvention of the governmental process, even if not by criminal actions, creates a sham under Noerr-Pennington and amounts to private action unprotected by Parker<sup>21</sup>.

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<sup>21</sup> It is only a matter of semantics whether subversion of governmental processes is viewed as preventing Parker immunity from attaching in the first instance, or as invoking the Noerr-Pennington immunity "sham" exception. To be sure, Noerr-Pennington only comes into play if Parker is viewed as initially applying; if the government is shown not to be an independent actor due to involvement of its officers in a conspiracy, however, so that so-called "attempts to influence" its actions are in fact - as here - but "sham" acts in furtherance of the conspiracy, the restraints in question would come clearly under the head of private action. See, e.g., Allied Tube & Conduit, 486 U.S. at 492. To paraphrase Allied Tube, the issues of Parker and/or Noerr-Pennington immunity in this case thus collapse into the issue of antitrust liability.



A. Failure to object properly to jury instructions precludes this Court's review of the Questions Presented by Petitioners.

This Court has refused to consider issues not preserved by proper objection, or otherwise abandoned, in the trial court. In Kibbe, 480 U.S. at 257, the Court dismissed a writ of certiorari as improvidently granted under circumstances almost identical to those presented here. Certiorari had been granted to resolve a question having to do with issues of municipal liability.<sup>22</sup> On plenary consideration, however, the Court found that those issues had not been properly preserved in the District Court, even though the Circuit Court of Appeals had written about them. This Court wrote:

We ordinarily will not decide questions not raised or litigated in the lower courts. See California v. Taylor, 353 U.S. 553, 556, n.2 (1957). That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction, since Rule 51 of the Federal Rules of Civil Procedure provides that "[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict." 480 U.S. at 259 (emphasis supplied).

Here, Petitioners did not object properly to the jury charges on both the Parker and Noerr-Pennington issues. See supra at n.6. Indeed, as in Kibbe, Petitioners proposed an alternative instruction<sup>23</sup> that varies in no material fashion from the

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<sup>22</sup> Under Monell v. New York City Department of Social Services, 436 U.S. 658 (1978).

<sup>23</sup> Discussed supra at p. 5.

instructions the District Court actually gave. See supra at n.7. From identical conduct by the Petitioners in Kibbe, this Court found a waiver of the questions presented, which precluded Supreme Court review: "it appears that in the District Court petitioner did not object to the jury instruction stating that gross negligence would suffice . . . and indeed proposed its own instruction to the same effect." (Id. at 258).

As in Kibbe, therefore, review of the Petitioners' Questions is precluded and the writ of certiorari should be dismissed as improvidently granted. In any event, however, the Petitioners' failure to object to the Parker and Noerr-Pennington instructions, and their proposal of a charge substantially identical to the ones given, prevent Petitioners from complaining of those instructions in this Court. Sunkist, 370 U.S. at 25-27. Unlike Sunkist, Petitioners here failed to make the timely and specific objections which permitted this Court's analysis there of the jury charges. Id. at 26-27. Because the jury charges here are effectively impervious, all sets of circumstances -- all scenarios -- which the jury was told would lead to Petitioners' liability must be deemed legally correct, at least in this case. Moreover, under Sunkist, the jury's verdict must be read as tantamount to a finding of all liability scenarios within the scope of the jury instructions. Id. at 25-27.

B. Parker and Noerr-Pennington do not apply where there has been a subversion or circumvention of the Governmental process.

(i) Parker

This Court in Parker v Brown concluded that the Sherman Act prohibited individual and not state action, 317 U.S. at 352, while recognizing that in the case before it:

The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. Id. (citations omitted).

Parker thus signals this Court's view that conduct of the state itself in combination or conspiracy with private parties to restrain trade or establish monopolies is unlawful and unprotected under the Sherman Act because such conduct is not a valid act of government. This limitation upon the protection for state action has come to be known as the "co-conspirator exception." It also applies to immunity claimed under Noerr-Pennington. See infra at 38.

A number of federal courts, including this Court, have expressly recognized the co-conspirator exception to state action immunity. E.g., Commuter Transportation Systems, Inc. v Hillsborough County, 801 F.2d 1286 (11th Cir. 1986) (co-conspirator exception recognized; however, state action immunity found for airport authority with power to limit competition in limousine service where plaintiff failed to show injurious conspiracy); Greyhound Rent-A-Car, Inc. v City of Pensacola, 676 F.2d 1330 (11th Cir. 1982), cert. denied, 459 U.S. 1171 (1983) (plaintiff must prove an illicit conspiracy to exclude the entity from state action immunity); Whitworth v Perkins, 559 F.2d 378 (5th Cir. 1977), vacated, 435 U.S. 992, aff'd on rehearing, 576 F.2d 696



(5th Cir. 1978), cert. denied, 440 U.S. 911 (1979); (the mere presence of a zoning ordinance does not necessarily insulate the defendants from antitrust liability where the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade). Subversion or circumvention of the legislative process is the underlying reason for the co-conspirator exception to Parker. This Court thus pointed out in California Motor Transport v Trucking Unlimited, 404 U.S. 508, 513 (1972), that "[c]onspiracy with a licensing authority to eliminate a competitor," or "bribery of a public purchasing agent" may violate the antitrust laws.

The essential point is that the joinder of private parties and governmental actors for their mutual personal benefit rebuts the presumption that governmental action is taken in the public interest.<sup>24</sup> Allied Tube, 486 U.S. at 503-04 (evidence may rebut the presumption that government acts in the public interest). The sort of behavior by public servants shown here amounts to nothing

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<sup>24</sup> This approach has explicitly been recognized by the Fourth Circuit, Judge Chapman writing:

Actions taken to discourage and ultimately prevent competitors from meaningful access to the processes of administrative agencies fall within the sham exception to Noerr-Pennington immunity. Thus, proof that appellants conspired to bring the chairman of the Central Planning Council and an assistant attorney general into their conspiracy, with the intent to foreclose HBC [plaintiff] from meaningful access to the Central Planning Council and the MCC, is within the sham exception to Noerr-Pennington.

Hospital Building Co. v Trustees of Rex Hospital, 691 F.2d 678, 687 (4th Cir. 1982) (citations omitted).

less than a conspiracy with private persons for their economic benefit and the personal advantage of the conspiring officials. It results in the effective substitution of private business interests for true governmental judgment. When injury to competition results from this combination, no policy of the antitrust laws justifies this misconduct.

(ii) Noerr-Pennington

The Noerr-Pennington doctrine provides an exception to antitrust liability enabling citizens or business entities to influence or to petition public officials to take official action that will harm or eliminate competition. Eastern R.R. Presidents' Conference v Noerr Motor Freight, Inc. 365 U.S. 127 (1961); United Mine Workers v Pennington, 381 U.S. 657 (1965). These cases grew, in part, from the state action doctrine announced in Parker v Brown, on the theory that efforts to secure valid governmental action which was itself immune from antitrust attack should similarly enjoy immunity.<sup>25</sup>

In a recent decision involving the issue of whether joint efforts to influence the setting of a private electrical association's product standards, which were routinely adopted by state and local governments, qualified for Noerr immunity, this Court significantly clarified the sweep of the doctrine. In Allied

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<sup>25</sup> However, the fact that efforts to secure legislation are protected by Noerr-Pennington does not mean that the legislation ultimately enacted or conduct taken pursuant to such legislation will be shielded from antitrust review under Parker v Brown. The doctrines, while related, are treated separately by the courts.

Tube, 486 U.S. 499, the Court reviewed the rule of Noerr-Pennington and stated:

The scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue. "[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. Noerr, supra, at 136; see also Pennington, supra, at 671. In addition, where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is "incidental" to a valid effort to influence governmental action. Noerr, supra, at 143. The validity of such efforts, and thus the applicability of Noerr immunity, varies with the context and nature of the activity. (emphasis added).

In Allied this Court found a sham under Noerr-Pennington where a quasi-legislative process had been subverted and circumvented even though no crime was committed. See Hospital Building Co. v Trustees of Rex Hospital, 691 F.2d 678, 687 (4th Cir. 1982) (a private-public "conspiracy with the intent to foreclose [the plaintiff] from meaningful access to [a governmental body] is within the sham exception to Noerr-Pennington"); Racetrac Petroleum, Inc. v Prince George's County, 601 F.Supp. 892, 910 (D.Md. 1985), aff'd, 786 F.2d 202 (4th Cir. 1986).<sup>26</sup>

<sup>26</sup> There the court said:

In determining whether the challenged conduct is protected or sham, the court must initially decide whether the immediate objective of the actor was to achieve his anticompetitive purpose by obtaining legitimate governmental action or by abusing governmental process in order to prevent legitimate governmental decision-making. (emphasis supplied)...so understood, the sham exception serves the same purpose as the Noerr-Pennington doctrine of which it has become a part. The exception protects free speech and the governmental decision-making process by attaching liability to those



The dispositive issue is not whether government action is somehow "involved" in the challenged restraint, but whether the restraint originated in valid government, as opposed to private, action.<sup>27</sup> This Court thus in Allied Tube made clear that the Noerr-Pennington doctrine does not extend to "every concerted effort that is genuinely intended to influence governmental action." 486 U.S. at 503. See also Federal Trade Comm'n v Superior Court Trial Lawyers Ass'n, \_\_\_\_\_ U.S. \_\_\_\_\_, 110 S.Ct. 768, 776 (1990):

If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports ... Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms ... Firms could claim immunity for boycotts or horizontal output requirements on the ground that they are intended to dramatize the plight of their industry

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who would act to muffle the voices of competitors seeking access to government. (emphasis supplied).

601 F. Supp. at 910; accord Bieter Co. v Blomquist, 1990-1 Trade Cases, §69, 083 (1990 WL 107531) (D. Minn. 1990) (exploring the differences between protected "legitimate lobbying ...[that] produces an anticompetitive effect" and "illegal conduct").

<sup>27</sup> As the Fifth Circuit has noted, the presence of state participation in an antitrust claim signals not the conclusion of the inquiry, but rather "only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter. We reject 'the facile conclusion that action by any public official automatically confers exemption'." (citation omitted). Woods Exploration & Producing Co., Inc. v Aluminum Co. of America, 438 F.2d 1294 (1971), reh'g denied (1971).

and spur legislative action.

110 S.Ct. at 776, quoting Allied Tube, 486 U.S. at 503 (citations omitted).

The Petitioners asked for a charge based upon Affiliated Capital Corp. v City of Houston, 735 F.2d 1555 (5th Cir. 1984) (en banc), reh'g denied, 741 F.2d 766 (5th Cir. 1984), cert. denied, 474 U.S. 1053 (1986). J.A. \_\_\_\_ . In Affiliated, cable TV contractors were selected by the city based on their "political power." Id. at 1557. The mayor "abdicated his responsibility," and the Fifth Circuit held that Noerr-Pennington immunity did not apply under a co-conspirator exception, even though the Plaintiff was nominally permitted to go before the city council. That en banc court applied the co-conspirator exception and/or the sham exception as necessary.

The policy behind the sham exception to Noerr-Pennington is that competitors in OMNI's (Affiliated's) position would become totally lost if it were permissible for the government to become part of a conspiracy, hold meaningless hearings or other proceedings, and then purport to "decide" what had already been determined (for reasons having nothing to do with the public trust) by the private co-conspirators in concert with the public officials who were perverting their offices. The sham exception does not come into play except when the rules of competition have been shredded by government and private actors conspiring.<sup>28</sup> The sham

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<sup>28</sup> Petitioners also attempt to argue that the only co-conspirator exception to Parker ought to involve situations in which the government is in effect an enterprise partner

exception to Noerr-Pennington (or the co-conspirator exception) is thus the flip side of the Noerr-Pennington coin. (See, supra n.26).

As in all "sham" exception cases, Respondent's damages flow from the denial of access to valid governmental process brought about by Petitioners' illegal agreement -- not from any one governmental action or piece of legislation. See Allied Tube, 486 U.S. at 499-500. That is, OMNI's damages were caused by the City/COA secret agreement to take whatever action was required -- not by one ordinance or another. Thus this case, like all "sham" exception cases, has nothing to do with the cases on which Petitioners rely, where inquiry into legislative motive, for the purpose of setting aside legislation, is eschewed. See Pet. Brief at 19-20.

Respected commentators agree that Noerr-Pennington immunity simply does not apply here. As Professor Areeda puts it:

'Conspiracy' is not inapt where the member(s) of an official agency

- (1) Accepts a bribe;
- (2) Decides out of personal bias and for no other reason;
- (3) Decides in favor of a personal financial interest in

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with the private conspirator. (See Pet. Brief at 18-19). They erroneously cite to 1 P. Areeda & D. Turner, Antitrust Law, §212c, in support of this proposition.

Areeda and Turner were pointing out that such a situation was only one of several situations in which there would be no immunity. As they had previously written on the same page: "the quoted language reminds us that the Court was not eliminating all antitrust applications where state law or action is involved, that preexisting limits were not being overruled, and that room was reserved for future elaboration and development." (Id.)



privity with or perhaps even closely allied to that of one or more of the plaintiff's rivals, whether on the board or not. (P. Areeda & D. Hovenkamp, Antitrust Law, Par. 203.3a, 203.3c, 1987 Supp., p.33)

These concerns, as documented by the evidence and verdict here, are particularly appropriate at the local government level, where the safeguards that tend to produce fair political decision making are often either tenuously present or entirely absent. (cf. Allied Tube, 492 U.S. at 502-03).<sup>29</sup>

Both cases and commentaries concur that heightened scrutiny of municipal government action is appropriate. Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L.Rev. 837, 853-857 (1983) (Reasonable guarantee of due consideration to the public interest in large legislatures does not apply with regard to local legislative bodies).<sup>30</sup> See, also,

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<sup>29</sup> Petitioners themselves acknowledge that the precipitous, knowingly illegal and unconstitutional act of the City in passing the initial moratorium against the advice of the City Attorney who told the Council of its unconstitutionality may suffice by itself to invoke the "sham" exception to Noerr-Pennington. (See Pet. Brief at 35, n.26.)

<sup>30</sup> As Rose observes:

However much or little local governments may structurally resemble the Federalist legislature in general, they are very unlikely to be restrained by the Federalist safeguards in making specific piecemeal land decisions. In making these decisions, which involve only a few interested parties meeting only on single issue, legislatures are restrained neither by a coalition-building process that assures the fairness of the decisions, nor by a clash of interests that gives time for sober consideration. Courts should therefore not assume that these safeguards have worked. If these decisions are to be found reasonable, the finding

McDonald v Board of Comm'rs, 238 Md. 549, 210 A.2d 325 (1965) (Barnes, J., dissenting) (discussing political corruption in connection with local zoning decisions); Cf. Chrobuck v. Snohomish County, 78 Wash. 858, 865, 480 P.2d 489, 494 (1971) (contact between the company and zoning commissioners caused invalidation of the zoning decision); see also Hovenkamp and Mackerron, Municipal Regulation and Federal Antitrust Policy, 32 UCLA L. Rev. 719, 782-783 (1985); Deutsch, Antitrust Challenges to Local Zoning and Other Land Use Controls, 60 Chi. - Kent L. Rev. 63, 87-88 (1984) (antitrust laws should apply when governments are involved in "corruption, improper influence for the benefit of private individuals, and official's self-dealing"); and C. Haar & J. Kayden, Landmark Justice (1989).

Congress itself, through enactment of the Local Government Antitrust Act, 15 U.S.C. §§34-36, has recognized that municipalities may subject themselves to antitrust liability for their anticompetitive conduct. Although a municipality may obtain relief under the Act from damages liability for its antitrust violations, the municipality remains liable nonetheless and may be subject to equitable measures. Id.<sup>31</sup> Moreover, the relief from

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requires some alternative source of fairness and due consideration. Rose, Planning and Dealing. Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L. Rev. 837, 856 (1983).

<sup>31</sup> The District Court here granted the City's motion for exclusion of damages liability, but let the issue of their liability for injunctive relief go to the jury. The Fourth Circuit properly directed the District Court, on remand, to fashion such relief.

damages afforded by the Act in no way extends to non-governmental co-conspirators, who remain fully liable for the damages caused by their conspiracy with public actors. Id.; see Dennis v Spark, 449 U.S. 24 (1980) ("no good reason for conferring immunity on private persons who persuaded the immune judge to exercise his jurisdiction corruptly").

(iii) PROOF OF SUBVERSION OR CIRCUMVENTION

The Fourth Circuit held that the following inferences, as examples, were amply supported by the jury verdict in view of the jury charges and the evidence (the sufficiency of which is not at issue):

- a. The City was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry. (Pet. App. 9a).
- b. Petitioners engaged in "private contacts and agreements [that] relate not to the purpose of attaining governmental action but solely to forcing competitors from a particular market." (Pet. App. 12a).
- c. "[T]he facts support a jury conclusion that COA's interaction with the mayor, City Administrators and members of the Council 'was actually nothing more than an attempt to interfere directly with the business relations of a competitor' or an attempt to harass and deter OMNI ...[and] that COA's purposes were to delay OMNI's entry into the market and even to deny it a meaningful access to the appropriate city administrative and legislative fora. The evidence, for example, supports inferences that COA instigated the Council's enactment of an unconstitutional ordinance even though the city attorney had advised of its probable unconstitutionality, and that COA encouraged the City's later instruction to its attorney to proceed with litigation to stall until a moratorium could be enacted." (Pet. App. 22a) (emphasis supplied).



- d. "[T]he jury verdict ... necessarily reflected its findings that COA's actions were a 'sham' and, construing the evidence with appropriate deference to the verdict, it supports that finding." (Pet. App. 23a).

These actions by COA and the City, as conclusively established by the jury verdict, show a clear subversion and/or circumvention of the government process. Neither subversion nor circumvention of government is protected by Parker or Noerr-Pennington.

II. CORRUPTION OF THE GOVERNMENTAL PROCESS SUSTAINS THE JUDGMENT

This Court has never recognized any immunity from antitrust liability under Parker or Noerr-Pennington for the corrupt use of governmental process. The abandonment of public responsibilities to private interests surely amounts to the corrupt use of governmental power. In Allied Tube, this Court recognized bribery or corruption of governmental process as being within the sham exception to Noerr-Pennington. 486 U.S. at 504. Again in Allied, this Court held that proof of "personal financial interests" on the part of public officials who impose restraints on trade means "that the restraint has resulted from private action," Id. at 502, unprotected by Parker. The Court of Appeals dissent acknowledged that both Parker and Noerr-Pennington immunities would be defeated by proof of illegal or fraudulent actions, or corrupt or bad faith decisions, or selfish or corrupt motives by Petitioners. (Pet. App. 44a, 48a). Petitioners themselves concede that proof of what they call "direct corruption," including bribes and personal financial interest, would show a "deviation from the legislators'

presumed attention to the public interest," which would negate Parker. Still other federal courts, and this Court, have recognized the co-conspirator exception to Parker. See supra at p. 29. At bottom, however, it was within the jury's province to determine what constituted corruption of the governmental process in their community. In response to the express invitation of Petitioners' closing arguments to decide the case on the question of corruption, the jury returned a verdict against Petitioners that has a finding of corruption well within its ambit.

A. Failure to request pertinent jury instructions precludes this Court's review of the Questions Presented of Petitioners.

Although Petitioners argued to the jury that this case was about political corruption,<sup>32</sup> they did not properly request a charge that only "direct corruption" (Pet. Brief at 12, 24-25, 27) would support a verdict against them. See supra at n.9. They thus have not preserved, for this Court's review, the question of whether proof of "direct corruption" alone defeats Parker and

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<sup>32</sup> Respondent likewise treated corruption as part of this case all along. See, Resp. Answer to (4th Cir.) Pet. for Rehearing at 5 ("Appellees ... completely ignore the evidence of corrupt motivation and mutual back scratching ... which motivated the 1980 agreement to preserve the corrupt agreement between the City and COA ...") (4th Cir.) Brief for Appellant at 19 (Petitioners' "scheme designed to shore up and perpetuate their illegal and mutually beneficial activities") and at 40 ("The City Officials and COA both benefited in corrupt ways from their mutual back scratching."); Resp. Summary Judgment Opposition Memorandum at 8 ("...illegal contacts with members of City Council"); and at 13 ("... the City and COA were engaged in mutual back scratching").

Noerr-Pennington immunities. See supra at p. 26.

- B. Parker and Noerr-Pennington do not apply because of the proof of illegal, fraudulent, corrupt, bad faith or selfish actions by Petitioners.

In view of the policies illuminating both Parker and Noerr-Pennington, the finding of corruption embraced by the jury's verdict properly could have rested on proof of the City's abandonment of its public responsibilities. Quite apart from that, however, proof of illegal or fraudulent action, or corrupt or bad faith decisions, or selfish or corrupt motives by Petitioners was well within the scope of the jury's verdict. See supra at p. 25. Surely this amounts to proof of what Petitioners call "direct corruption" of the governmental process which Petitioners themselves concede would sustain the judgment. (Pet. Brief at 12, 24-25, 27). That concession by Petitioners is consistent with, and mandated by, this Court's decision in Allied and the law as acknowledged by both the majority and the dissent in Fourth Circuit.

The jury finding of corruption results not just from the instructions concerning, inter alia, "illegal agreements" and "illegal arrangements," or from the evidence, or from Petitioners' closing argument inviting the jury's decision on the "corruption" issue. Beyond the instructions, the evidence and the summation, the jury was empowered to bring its common sense and logic to bear in deciding this case. Plainly the jury's common sense and logic could have led it to conclude that what this case revealed was, in Petitioners' words, "government corruption. No matter how you



slice it." J.A. \_\_\_\_ [Tr. at 2449].

Several other factors reinforce the reasonableness of the jury's appraisal. For example, the standards that would have guided a jury in determining government corruption under the Hobbs Act, 18 U.S.C. §1951, were satisfied here. United States v. McCormick, 896 F.2d 61, 66 (4th Cir. 1990), cert. granted, \_\_\_\_ U.S. \_\_\_\_ (1990). As the Fourth Circuit said:

"if payments to elected officials are not treated as legitimate campaign contributions by either the payor or the official, then a jury may reasonably infer that these payments are also induced by the official's office in violation of the Hobbs Act," [setting standards for assessing the legitimacy of campaign contributions, including:] "(1) Whether the money was recorded by the payor as a campaign contribution, (2) whether the money was recorded and reported by the official as a campaign contribution, (3) whether the payment was in cash, (4) whether it was delivered to the official personally or to his campaign, (5) whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor or supported legislation that would benefit the payor, (6) whether the official had supported similar legislation before the time of the payment, and (7) whether the official had directly or indirectly solicited the payor individually for the payment.);

The jury had heard evidence from Mr. Cantey, for example, that he understood that if a company did favors -- such as providing free or reduced-cost billboard space -- for a politician, it expected the politician to do favors in return: a classic Hobbs Act "quid pro quo." United States v Barber, 668 F.2d 778, 784 (4th Cir. 1982) (providing free liquor to government officials in return for "favors" violated the Hobbs Act). (Cf. United States v. Dozier, 672 F.2d 531 (5th Cir. 1982)). Further, there was no doubt that such favors were provided by COA to politicians, including specifically the City politicians here involved. The jury from

this had reason to find a pattern and practice of the City and COA exchanging favors. United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988) (en banc); United States v. Mazzei, 521 F.2d 639 (3d Cir. 1974) (en banc), cert. denied, 423 U.S. 1014 (1975). The provision of free or reduced-price, strategically-placed billboard space in return for control of access to the market -- since at least 1980, and with regard then to another competitor, according to the proof before the jury (Pet. Ann. 13a) -- clearly establishes the motive and inducement.<sup>33</sup>

As members of the same community as Petitioners, moreover, the jurors may well have understood that corruption is a way of life

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<sup>33</sup> Inducement can be inferred, of course, from an expectation of mutual back-scratching even in the absence of express inducement by the officeholder. Moreover, the payments still amount to government corruption in the form of bribery. Cf. U.S. v. Aguon, 851 F.2d 1158 (9th Cir. 1988) (en banc). Judge Aldisert of the Third Circuit explained the distinction in dissent in United States v. Cerilli, 603 F.2d 415, 435 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980):

A public official charged with extortion under the Hobbs Act should be able to argue that although he did in fact receive something of value, it was given at the initiative of the donor, and not as a result of force, fear or duress emanating from the defendant. Thus, in an indictment for extortion, it is logically and jurisprudentially sound to permit a defense of bribery. To hold otherwise is to blur completely the distinction between the two crimes.

Of course, the crimes are still crimes. And they both amount to "government corruption. No matter how you slice it."

in political South Carolina.<sup>34</sup> In using their common sense to fit together the evidentiary puzzle in this case, the members of the jury may have used that understanding to reach the conclusion, implicit in their general verdict, that Petitioners here had corrupted the municipal government process.

Indeed corruption, if that be deemed the test, is undoubtedly established by the abandonment and relinquishment of governmental responsibilities to a private monopolist. This was clearly demonstrated by the 1980 secret agreement to allow COA to use the City's resources and power to ensure COA's monopolistic position and the City Council members their politically crucial, free and/or discounted, strategically-placed, and/or stolen billboard space.<sup>35</sup>

A fundamental point for this Court is both simple and clear: whether the conduct of Petitioners be called "directly corrupt," "corrupt," or "subversion or circumvention of the governmental process," the end result is the same -- OMNI has been unfairly, wrongly, and without any policy justification deprived of the right to compete in the outdoor advertising market in Columbia, S.C.. OMNI has been denied the right to compete unhampered by

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<sup>34</sup> E.g., There is a current Hobbs Act investigation and prosecution of members of the South Carolina legislature in Columbia, focusing on bribery and corruption among legislators and perhaps other State officials. N.Y. Times July 22, 1990, Section 1, page 16.

<sup>35</sup> Corruption of governmental process through an illegal conspiracy is illegal advocacy and not protected by the 1st Amendment as Petitioners concede. (Pet. Brief at 32).



governmental coercion resulting from an abuse of the public trust through a conspiracy. Petitioners wish to have this Court articulate a "direct corruption" standard setting out a "bright line" rule to serve the interests advanced by certain amici. Respondent submits that this would do no favor to the nation, since exclusion from competition through subversion or circumvention is no less harmful than is exclusion through "direct corruption" as Petitioners seem to suggest. Respondent does not believe that the "direct corruption" test would be any simpler than the existing guideline of subversion or circumvention of the governmental process.

However, Respondent respectfully submits that whatever the approach taken by this Honorable Court, the evidence upon which the jury found a conspiracy meets that requirement.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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Supreme Court, U.S.  
**FILED**  
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CLERK

In The  
**Supreme Court of the United States**  
October Term, 1990

CITY OF COLUMBIA AND COLUMBIA  
OUTDOOR ADVERTISING, INC.,

*Petitioners,*

vs.

OMNI OUTDOOR ADVERTISING, INC.,

*Respondent.*

**RESPONDENT'S BRIEF**

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## RESTATED QUESTIONS PRESENTED

1. Does a jury verdict establishing economic injury to Respondent caused by subversion or circumvention of municipal government process sustain a judgment against the Petitioner corporation and/or municipality under the co-conspirator exception to *Parker v Brown*, and/or the sham exception to *Noerr-Pennington*?
2. Does a jury verdict establishing economic injury to Respondent caused by corruption of municipal government process sustain a judgment against the Petitioner corporation and/or municipality under the co-conspirator exception to *Parker v Brown* and/or the sham exception to *Noerr-Pennington*?



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No. 89-1671

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In The  
**Supreme Court of the United States**  
October Term, 1990

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CITY OF COLUMBIA and  
COLUMBIA OUTDOOR ADVERTISING, INC.,  
*Petitioners,*  
v.

OMNI OUTDOOR ADVERTISING, INC.,  
*Respondent.*

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**On Writ of Certiorari To The United States  
Court Of Appeals For The Fourth Circuit**

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**BRIEF FOR RESPONDENT**

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**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

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The Petition for a Writ of Certiorari did not cite to or make reference to the First Amendment to the Constitution, although Petitioners now attempt to rely upon it. (Pet. Brief at 2).

## STATEMENT

This case was tried under the antitrust laws of the United States based upon the actions taken by Columbia Outdoor Advertising, Inc. (COA) to keep and further its monopoly power in the City of Columbia, South Carolina. Central to COA's illegal activities was a pre-1981 secret agreement between COA and the City of Columbia to the effect that the City and COA would use their respective powers to ensure COA favored City Council members as it kept its monopolist position in the Columbia outdoor advertising market. OMNI in both late 1981 and early 1982 tried to enter the Columbia market only to have COA and the City rise up against it at every turn leaving OMNI ruined and COA as the monopoly billboard power in the Columbia market.

The City now wants to say that they have immunity to conspire and to follow a proven course of action to ruin OMNI and protect COA. COA wants to say it can with immunity conspire with the City, steal sign locations and generally use its agreement with the City and its monopolistic powers to ruin OMNI. No such immunity under any doctrine is recognized or warranted.

### 1. The Verdict.

After hearing fifteen (15) days of testimony and reviewing over 220 exhibits, and after receiving instructions on the law, to which no proper or relevant objections were made by Petitioners, a jury of twelve returned a unanimous verdict in favor of Respondent as follows:

"Do you find that the Defendants, Columbia Outdoor Advertising, Inc., and the City of Columbia conspired in restraint of trade against the Plaintiff, OMNI Outdoor Advertising, Inc. Answer: Yes." (Court of Appeals Joint Appendix [Tr.] at 2502).

"Do you find that the Defendants, Columbia Outdoor Advertising, Inc., and the City of Columbia conspired against the Plaintiff, OMNI Outdoor Advertising, Inc., to monopolize the outdoor advertising market in Richland and Lexington Counties? Answer: Yes." (Tr. at 2502-2503).

The jury went on to render general verdicts against COA as follows:

Count I: \$600,000 actual damages

Count II: \$400,000 actual damages<sup>1</sup>

Count III: \$11,000 actual damages<sup>2</sup>

With the rendering of the jury verdict, it is clear that all disputed questions of fact have been resolved in

<sup>1</sup> The jury was also instructed on monopolization and attempted monopolization. (See J.A. at 67, 81-90 (esp. 83-84, 89)). The jury was instructed that a finding of monopolization or attempted monopolization could rely solely upon the actions of Columbia Outdoor Advertising, Inc. (*Id.* at 67, 89). It thereafter returned a general verdict on Count II, which was the conspiracy to monopolize, attempted monopolization and monopolization count, in the amount of \$400,000.00. Findings of conspiracy to monopolize, attempted monopolization and monopolization are all therefore embraced in the jury's general verdict on Count II. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962). No issue regarding the attempted monopolization and monopolization aspect of Count II is before this Court. Therefore, the verdict on that count, with trebling and interest, rests equally upon grounds not challenged before this Court and should not be disturbed. *Id.*

<sup>2</sup> The jury found that the Petitioners violated the South Carolina Unfair Trade Practices Act and awarded \$11,000.00

(Continued on following page)



Respondent's favor.<sup>3</sup> Courts reviewing a jury verdict therefore take as true all evidence for the prevailing party, make all reasonable inferences favoring the prevailing party that are allowed by the jury instructions, and disregard all countervailing evidence. *Sunkist*, 370 U.S. at 25-27; *Gold v National Savings Bank*, 641 F.2d 430, 434 (6th Cir. 1981); *Schultz and Lindsay Construction Co. v Erickson*, 352 F.2d 425, 430 (8th Cir. 1965).

In reviewing jury verdicts rendered under federal statutes this Court applies the same standards:

this Court has repeatedly held that where "there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. Only when there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear."

*Dennis v Denver & Rio Grande Western R.R. Co.*, 375 U.S. 208, 210 (1963) (FELA case) (citations omitted). Faithful to

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for that violation. The Fourth Circuit reinstated this verdict also, instructing the District Judge to exercise his discretion pursuant to law regarding trebling and attorney's fees. Since this was clearly an authorized verdict under South Carolina law (See *Bocook Outdoor Media, Inc. v Summey Outdoor Advertising, Inc.*, 294 S.C. 169, 363 S.E.2d 390 (Ct. App. 1987) (outdoor advertising industry was not exempted from S.C. Unfair Trade Practices Act, which clearly provided for trebling of damages)), it also should stand in all events; finally, the Unfair Trade Practices matter was not brought before this Court on the *certiorari* petition.

<sup>3</sup> Petitioners do not challenge the sufficiency of the evidence supporting the verdict and *certiorari* was not granted to review the sufficiency of the evidence.

these standards of deference to a jury's considered verdict, this Court in antitrust cases treats all disputed questions of fact as being resolved in favor of the prevailing party, *Texaco, Inc. v Hasbrouck*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 2535, 2538 (1990); infers that the jury found for the prevailing party on all theories presented by the jury charges, *Sunkist*, 370 U.S. at 25-27; and upholds the jury's verdict absent a fatal legal error in the jury charges to which a proper and timely objection was made. *Id.* The Fourth Circuit majority applied these standards in reinstating the jury's verdict here. (Pet. App. 3a, 17a, 23a)<sup>4</sup>.

## 2. The Jury Charges.

The permissible – indeed mandatory – inferences from the jury verdict are drawn from the relevant jury charges. *Sunkist*, 370 U.S. at 25-27. The jury in this case was charged that Petitioners could be found liable if they had participated in an "illegal arrangement" or an "illegal agreement" or had agreed to "violate the law, or to accomplish an otherwise lawful result in an unlawful manner." (J.A. at 79). If they found that Petitioners procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of Respondent to the market pursuant to a conspiracy, then the jury was charged that it could find liability for that reason as well. (J.A. at 81).<sup>5</sup>

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<sup>4</sup> "Pet. App." designates pages to the Appendix to the Petition for a Writ of Certiorari.

<sup>5</sup> The Petitioners neglect to point out that the underlined material was part of this portion of the jury charges. Because of  
(Continued on following page)



Finally, the jury was instructed that liability could flow from a finding that, pursuant to a conspiracy, Petitioners foreclosed Respondent "from meaningful access to a legitimate decisionmaking process with regard to the ordinances in question." (*Id.*). The Fourth Circuit correctly noted there were no proper objections made to the jury instructions.<sup>6</sup> (Pet. App. 37a). Not only did Petitioners fail to follow Rule 51 of Fed.R.Civ.P. concerning objections to jury charges, but they also proposed an alternative instruction to the District Court, which set

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that important aspect of the jury charges, the jury was *not* permitted to hold Petitioners liable if it found only that COA lobbied for anticompetitive legislation.

<sup>6</sup> Columbia Outdoor Advertising (COA) objected to what it thought was an instruction that Petitioners could be held liable simply if COA had lobbied for anticompetitive legislation. (J.A. at 109-111). No such instruction was given. (*See supra* n.5). The District Court responded:

I am a little concerned about the possibility that I said that lobbying itself may be a conspiracy. If I said that, I am certain that I was wrong, *but if I said that activity was pursued for the purpose or in furtherance of a conspiracy, then it wasn't protected.* (J.A. at 112). (emphasis added).

The District Court's statement makes it clear that this instruction pertained to the co-conspirator exception to *Noerr-Pennington*, which was not reached by the Fourth Circuit. (Pet. App. 24a). No issue regarding the instructions on the "sham" interpretation of Petitioners' conduct was preserved by objection. The Petitioners vigorously, indeed, opposed the idea that their conduct was in fact sham (*see*, particularly, closing arguments for the City and for COA, (Tr. at 2398-2420, 2450-2477)) and were content to let the matter go to the jury.

forth basically the same legal principles as used by the District Court in its instructions (J.A. at 79-81) and the Fourth Circuit in its reasoning. (Pet. App. 12a). Instruction #18 requested by Petitioners, reads in relevant part that it would be wrong if there were:<sup>7</sup>

illegal agreement . . . for the specific purpose of damaging OMNI's business or for the specific purpose of either obtaining a monopoly in favor of COA or maintaining such a monopoly in COA's favor.

Neither the majority nor the dissent in the Fourth Circuit found the jury instructions to be erroneous as a matter of law. The Fourth Circuit majority analyzed the instructions and verdict and drew "necessarily reflected" inferences (Pet. App. 23a) that (1) the City was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry<sup>8</sup> (Pet. App. 9a); (2) the contacts and agreements here did not relate to the purpose of attaining

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<sup>7</sup> At J.A. 111 is a discussion of Instruction #18 in District Court which is set forth in full at J.A. 172-173.

<sup>8</sup> Respondent should point out that it has taken the position that zoning laws do not constitute the kind of *Town of Hallie v City of Eau Claire*, 471 U.S. 34 (1985) authorization to engage in anticompetitive activity that they were found to be by the Fourth Circuit. The South Carolina Zoning Enabling Acts are neutral police power enactments that do not contemplate authorizing anticompetitive activities. Lobbying of an entity which could not legally do what was being requested would obviously not be protected activity under any reading of law. Thus, such lobbying, even if it were restricted to wholly aboveboard, legitimate activity, would give rise to liability since there would just be no *Parker* issue involved.

governmental action but solely to forcing competitors from a particular market (Pet. App. 12a); (3) "COA's interaction with the mayor, City Administrators, and members of the Council 'was actually nothing more than an attempt to interfere directly with the business relations of a competitor or an attempt to harass and deter OMNI . . . [and] that COA's purposes were to delay OMNI's entry into the market and even to deny it a meaningful access to the appropriate city administrative and legislative fora. The evidence, for example, supports inferences that COA instigated the Council's enactment of an unconstitutional ordinance even though the city attorney had advised [the Council] of its probable unconstitutionality, and that COA encouraged the City's later instruction to its attorney to proceed with litigation to stall until a moratorium could be enacted" (Pet. App. 22a); and (4) "the jury verdict . . . necessarily reflected its findings that COA's actions were a 'sham' and, construing the evidence with appropriate deference to the verdict, it supports that finding." (Pet. App. 23a).

Petitioners argued to the jury that liability could be based only upon corruption:

"Don't misunderstand this case. This case is a case where the claim is government corruption. Government corruption, an illegal arrangement, the partnership in crime. I submit to you ladies and gentlemen that just cannot be found." (Tr. at 2476-77).

"This is what the case is about; corruption." (J.A. at 56).

The Petitioners went on to say:

"This is a case of government corruption. No matter how you slice it." (J.A. at 57).<sup>9</sup>

Inferences concerning corruption, therefore, reasonably can be drawn from the jury verdict, in view of (1) Petitioners' jury argument, (2) the instructions which authorized liability if Petitioners had entered into an "illegal arrangement" or an "illegal agreement," and (3) the evidence. The Fourth Circuit itself recognized that the inferences it set forth in the majority opinion were only by way of "example." (Pet. App. 22a).

The range of inferences available from the jury verdict is revealed by the jury instruction. The jury was specifically instructed that it could not hold Petitioners liable if it found: that they had engaged in "legitimate lobbying" (J.A. at 79-81); "[j]oint efforts truly intended to influence public officials to take official action" (J.A. at 78); or "concerted . . . effort[s] . . . genuinely to influence public officials." (J.A. at 78). Thus the jury's general verdict cannot, under any circumstances, give rise to inferences that the jury premised Petitioners' liability on any of these "legitimate" activities. Indeed, Petitioners' closing arguments made it clear that anything short of corruption was "legitimate."

The jury was instructed that it could hold Petitioners liable if it found the following:

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<sup>9</sup> No charge using the word "corruption" was requested nor was any charge objected to because of a lack of a corruption test, all in violation of Rule 51 Fed.R.Civ.P.



- i. an "illegal arrangement" or "illegal agreement" (J.A. at 79-80).
- ii. efforts by Petitioners to "violate the law, or to accomplish an otherwise lawful result in an unlawful manner" (J.A. at 79).
- iii. "procure[ed] and [brought] about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of the plaintiff" to the market pursuant to conspiracy. (J.A. at 81).
- iv. a conspiracy between the Petitioners "with the intent to foreclose the [Respondent] from meaningful access to a legitimate decision making process with regard to the ordinances in question" (J.A. at 81).

Given the jury's general verdict, the District Court's instructions and the Petitioners' jury argument, it is only reasonable to infer that the jury could have found that Petitioners had participated in, for example, an "illegal agreement," "illegal arrangement" and/or "efforts to violate the law, or to accomplish an otherwise lawful result in an unlawful manner." *Texaco*, 110 S.Ct. at 2538; Cf. *Sunkist*, 370 U.S. at 25-27. Embraced within such an "illegal agreement" or "illegal arrangement" would be, for example, bribery, coercion and/or kickbacks. Similarly, the jury verdict means that the jury could have inferred personal financial advantage to both COA and the City officials involved, and selfish or otherwise corrupt motives on the part of all Petitioners. Equally within the scope of an "illegal arrangement" or "illegal agreement" would be a finding by the jury of a direct link between

what the Petitioners would now call "campaign contributions" (of free or reduced cost, strategic billboard space not reported on campaign contribution forms or on income taxes) and the City's actions. Necessarily, however, the jury's verdict means that the jury found that *there was no "legitimate lobbying"* in Petitioners' activities.

All of these inferences from the jury's verdict, as well as others expressly drawn by the Fourth Circuit majority, would have been equally permissible under the instructions requested by the Petitioners. These requested instructions, like the ones given to the jury by the District Court, would have held Petitioners liable for an "illegal agreement" aimed at anticompetitive objectives.

Under *Texaco* and *Sunkist*, Respondents are entitled to all of these inferences under the charge and verdict, and under the proof made. All of the scenarios under which the jury was authorized to hold Petitioners liable, moreover, were consistent with Federal antitrust law. *Sunkist* at 29. In any event, Petitioners have lost any basis to challenge the jury charges that authorized these alternative bases for liability, both through their failure to make a timely and proper objection, and through their request for instructions indistinguishable from the law as charged to the jury. See *supra* nn.1, 5-6 and *infra* at pp.29-31.

### 3. The Evidence.

The proof paints a picture that even the dissent in the Fourth Circuit characterized as not being a model for a civics class, and which the jury reasonably found painted a picture of substantial local governmental misconduct



resulting in injury to competition and to OMNI. Although the issue is not before this Court, *see supra* n.3, there is no question but that there is sufficient evidence to support each of the inferences yielded by the jury's verdict.

This is not a case simply about the enactment of two anticompetitive ordinances. Nor is it a case about "legitimate" legislative lobbying. This is a case in which the City of Columbia and COA had a longstanding agreement that the City and COA would each use their respective power and resources to protect against all comers COA's monopoly position in the Columbia market. In return, City Council members received advantages made possible by COA's monopoly.

This agreement was carried out by the City harassing COA's new competition (OMNI); by the City threatening OMNI; by the City allowing COA sign locations while shutting down Columbia to OMNI; by the City threatening and passing moratoriums known to be unconstitutional but asked for by COA; by the City and COA's continuing frivolous litigation involving OMNI purely for delay; by the City giving COA secret inside information as to actions it was about to take; by the City's allowing COA to tailor an ordinance for the City to pass; by excluding OMNI from any legislative process; by COA's interfering with OMNI's receipt of business goods necessary for its operations; by allowing COA tax advantages to the detriment of the City; and by COA's stealing signs from one customer to give to another customer, including politicians.<sup>10</sup>

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<sup>10</sup> A conspiracy, of course, is a partnership, and an overt act of one partner may be the act of all without any new  
(Continued on following page)

Petitioners do not mention the fact that in 1980 COA and the City clearly entered into an agreement whereby the City and COA would do whatever it took to keep COA's competitors out of Columbia. In return COA gave special and beneficial treatment to City officials in their races for City Council. This included free or discounted billboard space as well as strategic and/or stolen billboard locations.

In 1980 another billboard operator, Robert O. Naegele, thought about coming into Columbia because of COA's very dilapidated and outdated plant. (Tr. at 3602-3605). In response to the Naegele threat in 1980 COA got an agreement with the City to pass a restrictive billboard ordinance at any time COA needed it. Mr. Cantey, COA's owner, wrote in a letter:

The Mayor of Columbia and the four councilmen are very good friends of ours. I discussed your suggestion with the Mayor about reworking our existing sign ordinances and he promptly said, "no problem." My son Jim has begun a study to determine exactly what restrictive measures we should request. (Tr. at 2704) (See also J.A. at 26).

When confronted with this letter Mr. Cantey said:

You know why I did that? To keep Mr. Naegele out. He was buying everything, Greenville

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(Continued from previous page)  
agreements specifically directed to that act. *United States v Socony Vacuum Oil Co.*, 310 U.S. 150 (1940), *reh'g. denied*, 310 U.S. 658 (1940).

[sic], Spartanburg, Gastonia, Greensboro, Asheville [sic], right all over me. Dooner wasn't even in it. (J.A. at 27).

The jury had ample basis to find an illegal agreement between the City and COA to give COA whatever protection it needed.

In early Fall of 1981 Mr. William Dooner organized and started an outdoor sign company called OMNI. (Tr. at 286). Before then, Mr. Dooner had thought that Columbia would be a good market. (Tr. at 213). Mr. Dooner and his associates made an extensive study of the Columbia market and concluded that COA, which completely controlled the Columbia market, had an inferior plant. (Tr. at 420, 645-647). They also determined that the regulations and zoning controls were unrestrictive so as to allow them to compete with COA. (J.A. at 18). With this information, OMNI entered the Columbia market in the Fall of 1981 with a planned leasing effort.

When OMNI decided to enter the Columbia market, COA was in a secure, monopoly position in the outdoor advertising market. (Tr. at 222, 301, 1511). It owned 95% of the outdoor advertising signs in the Columbia market (Tr. at 702).

Once the officers of COA got wind of OMNI's plan, Mr. W. Cantey made trips to investigate how COA could use its agreement with the City to sabotage and stop OMNI. He traveled to Baton Rouge, Louisiana, and Pensacola, Florida. (Tr. at 551, 2710). After discussing COA's competitive situation with his outdoor advertising friends, Mr. W. Cantey wrote in memo after memo that the way to stop OMNI was to call upon COA's agreement

with the City for a city moratorium on signs and then get a city ordinance controlling the location of signs so as to allow COA's signs and no one else's. These memos show as follows:

*Memo dated 11/3/81 - Pensacola trip*

"Get your own ordinance - 500 spacing" "Get city ordinance." (J.A. at 135).

*Memo dated 12/11/81 - visit with Gerry Marchand*

"Put in spacing 500' now." "Consider Moratorium." (Tr. at 2722).

*Memo regarding visit with Naegele in Spartanburg*

"Put in sign ordinance as soon as possible. 1,000'." (J.A. at 133).

*Memo dated 1/5/82 regarding a conversation with Gerry Marchand*

"Put in sign ordinance as quick [sic] as possible." (J.A. at 134).

Mr. W. Cantey was also told to raise COA's rates by at least 12% in July of 1982. (J.A. at 133). COA's rates were raised. (Tr. at 1484, 1532, 1810). Customers of OMNI were told by COA that OMNI was a "fly by night outfit." (Tr. at 508). Additionally, prices were cut and free space given in order to stop OMNI. (Tr. at 1091). One COA official was quoted as saying, "Don't just get 30 day contracts." He explained that he would give away contracts, if the customers bought the paper, just to get the second month of business. (Tr. at 822).



The jury consequently had ample basis to find that COA called upon its 1980 secret anticompetitive agreement with the City in order to illegally stop OMNI. Measures were chosen which would damage OMNI but not COA<sup>11</sup>. (Tr. at 1088).

The jury also considered evidence of the behavior of the Mayor and City Council, which amply supported a finding that they carried out the illegal agreement to protect COA. At one City Council meeting OMNI officials were singled out and unfairly attacked by the Mayor in open session. (J.A. at 18). On March 24, 1982, City Council and the Mayor passed a moratorium on billboards, banning the construction of billboards within the city limits without Council's express consent. (J.A. at 168). They were informed by City Attorney Roy Bates that this action was illegal. (J.A. at 23-24). The Council passed the moratorium nonetheless and, as was foreseeable to the Council, the State court held that their actions were unconstitutional. (J.A. at 122-129). Frivolous litigation was continued purely for delay. (Pet. App. 22a). Mr. Cantey admitted the ordinances were of benefit to COA. (Tr. at 1173).<sup>12</sup>

Immediately after the first moratorium was declared illegal City Council gave first reading to a second moratorium. (J.A. at 19-20, 121). This had the effect of keeping OMNI's business at a standstill. (Tr. at 1255). The

<sup>11</sup> Distribution of the sign locations is paramount. (Tr. at 195). As Mr. W. Cantey noted, the more good sites a company has, the more bad sites it can support. (Tr. at 1175). Coverage in Columbia is crucial. (Tr. at 879).

<sup>12</sup> See Pet. App. 14a, 15a.

Mayor's direct involvement in this second moratorium is evidenced in a City of Columbia Inter Office Memo. (Tr. at 3204). Even after the judicial declaration of unconstitutionality, the City, continuing its delaying tactics, dragged its feet about permitting OMNI to construct signs for which it had already leased sites. (J.A. at 24).

The final restrictive ordinance, passed on September 22, 1982, clearly protected COA. (Tr. at 338-339). This ordinance maintained and strengthened COA's dominant position in the Columbia market. Before passage of this ordinance, OMNI tried to provide input into the process but was consistently thwarted. (J.A. at 17-18, 24-25) (Tr. at 830-831).

The jury also had evidence, from notes made by City officials after meetings with COA, showing that COA's demands were codified as ordinances. COA demanded that the distance between signs in M-1 and M-2 zones be increased from 750 feet to 1,000 feet, which was accordingly done. (Tr. at 3785). OMNI objected to having any distance requirement on the opposite side of the streets. COA indicated it had no problem with such a requirement and Council passed it. (Tr. at 2198-99). The jury also heard that the September 22, 1982, ordinance was unreasonably and unusually strict in that it was tailored to ensure that OMNI could not get necessary sign locations in the critical Columbia core area. (Tr. at 835-847). The jury also considered another memo from the City Manager to City Council illustrating unfair bias in favor of COA and how OMNI was foreclosed from access to the governmental process. (Tr. at 3804-3805).



Considerable evidence went before the jury to demonstrate that, from March, 1982, to October, 1982, overt acts were taken in furtherance of an illegal conspiracy between COA and the City. A draft of a moratorium was written by Councilman Patton Adams on the back of an agenda, not the usual way of writing ordinances, the morning of March 10, 1982, the day of the first reading of the moratorium. (Tr. at 1901). That day, first reading was given to a moratorium described in the following:

Upon motion by Mr. Adams, seconded by Mr. Barnes, Council voted unanimously that no billboards will be constructed in the area bounded by Harden Street, the River, Heyward Street and Elmwood Avenue or in any area where a rezoning has been or shall be proposed, including the Rosewood Corridor area, without the express prior permission of City Council.<sup>13</sup>

(J.A. at 167).

The jury could have inferred, too, that COA had planned the moratorium and had called upon its agreement with the City from the evidence that on the 9th of March, COA sought and got from the City three new sign locations of which two were in the to-be proscribed area. (J.A. at 158) (Pet. App. 14a). Indeed, the jury could have inferred that COA wanted, and knew it could get, more from the City because of their agreement. COA had the City pass a more restrictive moratorium. On March 24, 1982, a reworded moratorium was passed. (J.A. at 168). The day before the final moratorium was changed, Mr.

<sup>13</sup> It is important to note that this draft of the moratorium did not cover *all* locations in Columbia.

Cantey visited his good friend the Mayor of Columbia at his office, in order to get the city wide moratorium. (J.A. at 156) (Tr. at 2081).

This moratorium was much more restrictive than the one given first reading on March 10, 1982. While no one took credit for these changes that obviously further protected COA (Tr. at 2190), the jury was free to infer that City Council knew that COA would receive the benefit and intended for it to do so. (Tr. 2170-74, 2190-2209). Councilman Barnes, on cross-examination, noted that the Mayor and Councilmen Adams and Bennett took an unusual and substantial interest in the moratorium and sign ordinance. (Tr. at 2252). Again COA knew of the upcoming moratorium change, while OMNI did not. Between March 9, 1982, and March 24, 1982, COA obtained from the City ten new locations in the area to be affected by the new moratorium of March 24, 1982. (J.A. at 158) (Pet. App. 15a).

From evidence of other events during this period, the jury had still further basis to infer the existence and implementation of an illegal, anticompetitive agreement between the City and COA to protect COA. In a letter of February 10, 1982, Mr. Cantey threatened Mr. Dooner:

At some point I think City Council will be forced to place some type of stringent restriction on our industry.

(Tr. at 2695).

At the airport in Atlanta Mr. Cantey told Mr. Dooner that he was going to get "1,000 feet spacing." (J.A. at 28).<sup>14</sup> He did just that.<sup>15</sup>

A review of Exhibit 21 (Tr. at 3785) shows that City planners had suggested 750-foot spacing in the critical areas and only same side spacing. In the final ordinance, Mr. Cantey got his protection: 1,000 feet spacing and opposite side spacing of 500 feet. (Tr. at 3785). The jury apparently inferred that this protection was pursuant to an illegal agreement, not legitimate lobbying.

Mayor Finlay berated OMNI at meetings (J.A. 18, 22, 35) and on the radio. (J.A. at 16). He made OMNI take down a three dimensional eagle sign, calling it an atrocity. (J.A. at 35). The eagle sign said:

"Columbia Your Progress is Soaring" (Tr. at 3315).

He never complained about COA's sign with a three dimensional life-size model of a man with his pants down. (Tr. at 2075-2076). When asked about this the Mayor could give no reasonable explanation. (Tr. at 2073-2076). The eagle sign advertised OMNI. (Tr. at 3315).

<sup>14</sup> Spacing is the key to being able to compete in the Columbia market core (downtown locations). City Exhibit 19 (Tr. at 3780) shows the small area that was open to billboards. Of course these were the main automobile traffic arteries to Columbia. OMNI's Exhibit 55 (J.A. at 137) shows the effect of spacing; Columbia was shut down to new billboards. Mr. Cantey knew 1,000 feet spacing would kill OMNI.

<sup>15</sup> See Pet. App. 16a.

During this period the City even took actions that allowed COA tax advantages to the City's detriment. (J.A. at 152, 155) (Tr. at 1755, 1802-03).

Before the advent of OMNI, in 1979, a company offering minimal competition against COA's big signs came to Columbia. (J.A. at 51). The Mayor said he got upset and wrote a memo; but the City did nothing about sign ordinances until OMNI threatened COA's monopoly. (Tr. at 2060-2066, 3786).

The day before the final moratorium, Mr. Cantey had an appointment to see the Mayor. (J.A. at 156). The next day, March 24, 1982, the original moratorium was mysteriously changed so as to be even more restrictive.<sup>16</sup> (J.A. at 167). The City then went into a fast track program to pass COA's restrictive permanent ordinance. (Tr. at 1917, 2027). From this, the jury had reason to infer the existence of an illegal and anticompetitive COA-City agreement, which was confirmed by the City's failure to perform the type of study one would expect of government before enacting legislation which the City clearly knew would be anticompetitive. (Tr. at 2646). However, Mr. Land, a planner, recommended 1,000 feet in C-3, C-4, and C-5; 750 feet in M-1 and M-2; and with no other restrictions except to display area. (Tr. at 3606). From that point, based upon what Jim Cantey of COA had sent to City Council, the City passed an ordinance, not as the planner had recommended, but that in effect froze COA in its monopoly and killed OMNI. (J.A. at 161) (Tr. at 1849-1850, 2016-2020, 2189-2200, 3785). OMNI was given no input into the process; it was a closed deal (J.A. at 17) as the jury apparently concluded.

<sup>16</sup> See. *Id.*, 14a-15a.



Mr. Cantey, in a meeting concerning the new ordinance, got mad and stormed out saying he would get Council to give him 1,000 feet spacing. (J.A. at 21). He did that, too. The 1,000 feet spacing closed down the Columbia core area and was the key to any ordinance intended to eliminate OMNI. (Tr. at 872).

A July 20, 1982, memo said that Mayor Finlay wanted to look at any proposed ordinance. (Tr. at 3204). There was a proposal to limit the display area to eliminate any more painted bulletins (big signs).<sup>17</sup> (Tr. at 3696, 3783). When the final ordinance was passed, display requirements were expanded to allow for these big signs. COA was protected again. The jury apparently asked, "Why was the Mayor so interested and vigorously active at this time?" It apparently found the answer in an illegal agreement between COA and the City.

The jury also had good reason to reject the City's explanations of its actions as inconsistent. Councilman Adams had said billboards were despicable. (Tr. at 1914). The rest of Council said they were against billboards. Yet right in the middle of all this supposed concern and hatred for billboards, on June 16, 1982, upon motion by Mr. Adams, the City granted COA a zoning ordinance change in order for COA to be allowed to build one of those billboards the City so despised. (Tr. at 380, 384, 387, 1221, 1914).<sup>18</sup>

<sup>17</sup> The zoning change was for a big sign, the type sign Mayor Finlay wrote a memo about in 1979. (Tr. at 3170).

<sup>18</sup> COA was even given the right to build one of those hated uni-pole signs in a historical zone. (Tr. at 1544).

The evidence considered by the jury gave abundant reasons to determine that COA was using the power of its billboard monopoly to favor one politician, particularly an incumbent one, over another. COA gave political discounts (Tr. at 2762-2782, 2821), free advertising (Tr. at 1520), and advantageously, strategically located space. (J.A. at 47-48).<sup>19</sup> The jury was free to apply its common sense in understanding the importance of well-placed billboards in local elections. Certainly, there was evidence before the jury that none of the other kinds of media allowed for targeting specific areas of a city or county: not radio, not television, not newspapers, not magazines, nothing else. (Tr. at 1690).

The jury apparently found, for good reason, that COA used that power in political races. In return for discounted billboards, free billboards, and strategically placed billboards, COA expected to be and was paid back by the politicians.

Mr. Cantey said when asked about charging one politician one rate and another a different rate:

Q. That's not fair, charging one nothing and other ones more than your rate card; is it?

By Mr. McDonald:

Objection as leading.

A. I don't know. Maybe he did him a favor.

Q. Maybe he did him a favor?

<sup>19</sup> COA even pasted over other ads which had been paid for so they could display advantageously located ads for their favored politicians. (J.A. at 47-48).



- A. May be he did him a favor so he compensated by giving him a free board. I don't know if that happened. (Tr. at 1206).

In discussing discounted space to politicians, Mr. Cantey Heath said:

- Q. You would expect her to do the favors you would want Lieutenant Governor Mike Daniel to do for you, too, wouldn't you?
- A. I would expect her to help me if I asked for it. (Tr. at 1627).

The Mayor and the Councilmen, so the jury apparently found, agreed to help COA keep out OMNI. It was the payback COA expected for their efforts in the Mayor's and Councilmen's elections.

The picture that the jury saw also included evidence of "double billing" (J.A. at 30-31) – a practice that even Mr. Cantey of COA said was stealing. (J.A. at 36). This evidence showed the jury a pattern and practice by COA to sell a prime billboard location to a national customer and then resell the same location for the same time to a local customer or politician, covering over the national customer's sign with a local customer's or politician's sign. (J.A. at 30-31).

From all of this, and other, evidence, the jury apparently had little trouble satisfying itself that the evidence did not add up to "legitimate lobbying." Instead, it apparently viewed that evidence as establishing and showing the implementation of a secret agreement between the City and COA to protect by all means COA's monopoly from any future competition.

When challenged by the Petitioners' closing arguments to search for evidence of corruption, moreover, the jury apparently found it. There is clear evidence of corruption in the record if that be needed. The free space or discounted billboard space was received by some Council members as a campaign contribution and not reported. (J.A. at 138-140, 159-160) (Tr. at 2056, 3256). The free space or discounted space given by COA was not recorded by COA as a contribution. (J.A. at 152-155). The recipients of the free or discounted billboards acted very specifically for the benefit of COA. (J.A. at 16-18) (Pet. App. 17a). Before these actions, the City essentially had left the billboard industry (COA) alone. (Tr. at 213, 349) (*See supra* at p. 21). COA expected favors and help in return for their giving free or discounted strategic and/or stolen sign locations to politicians. (Tr. at 1519-25, 1626-27). The jury thought the favors were returned and the actions illegal. *See infra* pp. 41, 45.

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## SUMMARY OF ARGUMENT

1. Petitioners' conduct at trial waived the questions concerning *Parker* and *Noerr-Pennington* they seek to present to this Court. At trial, Petitioners failed to make proper objections to the District Court's legal instructions regarding the co-conspirator exception to *Parker* and the sham exception to *Noerr-Pennington*. Petitioners also waived the questions presented to this Court by requesting their own jury instruction that tracks the law as charged by District Court. Petitioners' conduct thus falls within the doctrine of *City of Springfield v. Kibbe*, 480 U.S. 257 (1987), in which

this Court dismissed writ of certiorari as improvidently granted. Petitioners' failure to object to the relevant jury charges and their waiver of their objections through their own requested charges also mean that all potential bases for liability given to the jury are safe from legal attack or further scrutiny in this Court. *Sunkist*, 370 U.S. at 25-27. In any event, the jury charges were legally correct and sustain the judgment, as shown next.

2. Subversion or circumvention of the governmental process with anticompetitive results imposes antitrust liability on both a municipality and a private party, notwithstanding *Parker* or *Noerr-Pennington*. *Parker* and *Noerr-Pennington* do not validate the forfeiture of government to private interests through an agreement to eliminate competition. Thus *Parker* does not validate the combined illegal conduct of elected officials and private parties, and has a "co-conspirator" exception. Similarly, *Noerr-Pennington* does not validate "private action" masquerading as governmental action. The doctrines expressly protect only valid governmental action. This is because a municipality has no license from the state to use its delegated powers for purely private economic purposes, and because a private agreement to use governmental powers toward that end makes the governmental process a sham. Proof that Petitioners, for example, conspired solely to further COA's commercial purposes to the detriment of competitors; that Petitioners engaged in private contacts and agreements solely to force competitors from a market and to deny Respondent meaningful access to a relevant government forum – all as properly inferred from the

jury's verdict – thus sustains the judgment against Petitioners. The First Amendment does not extend to a conspiracy with government.

3. The relinquishment of government's fiduciary responsibility to the electorate also is corruption. If the Court, consequently, eliminates the co-conspirator exception to *Parker*, and/or disallows a sham exception<sup>20</sup> to *Noerr-Pennington* here despite demonstrated subversion or circumvention of the governmental process, then corruption of the governmental process with anticompetitive results alternatively warrants imposing antitrust liability on both a municipality and a private party, notwithstanding *Parker* or *Noerr-Pennington*. Consistently, and as reaffirmed recently in *Allied Tube & Conduit Corp. v Indian Head*, 486 U.S. 492, 504 (1988), this Court has held that "one could imagine situations where the most effective means of influencing governmental officials is bribery, and we have never suggested that that kind of attempt to influence the government merits [antitrust] protection." The jury's verdict, as amplified by the jury charges, and

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<sup>20</sup> The Fourth Circuit wrote:

"In our view, the jury verdict, in light of the instructions it received from the court, necessarily reflected its finding that COA's actions were a 'sham' and, construing the evidence with appropriate deference to the verdict, it supports that finding. In view of this holding, it is not necessary to consider the issue of whether there is a co-conspirator exception to *Noerr-Pennington* immunity." (Pet. App. 23a, 24a).

Thus, there is no issue before this Court of whether a co-conspirator exception to *Noerr-Pennington* applies. See *supra* n. 6.



as supported by the concededly sufficient evidence, supplies a finding of this type of corruption – which Petitioners call “direct corruption” – as well. Both the dissent in the Court of Appeals and the Petitioners here concede that “direct corruption” of the governmental process – as shown, for example, by personal financial interest, personal bias, bribes or other “illegal acts” – would sustain the judgment against Petitioners. The District Court’s unchallenged instructions and Petitioners’ evidence put a jury finding of just such “illegal acts” by Petitioners well within the scope of the jury’s verdict. Petitioners’ closing jury argument invited such a jury finding. The First Amendment, moreover, does not protect the use of corrupt means to obtain governmental action.

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### ARGUMENT

#### I. SUBVERSION OR CIRCUMVENTION OF GOVERNMENTAL PROCESS SUSTAINS THE JUDGMENT

The instructions given by the District Court and the instructions acquiesced in, and requested, by Petitioners clearly allow the jury verdict to stand. Furthermore, the principles of law as to both *Parker* and *Noerr-Pennington* as set forth by the Fourth Circuit are correct. Subversion or circumvention of the governmental process, even if not by criminal actions, creates a sham under *Noerr-Pennington* and amounts to private action unprotected by *Parker*<sup>21</sup>.

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<sup>21</sup> It is only a matter of semantics whether subversion of governmental processes is viewed as preventing *Parker*

(Continued on following page)

#### A. Failure to object properly to jury instructions precludes this Court’s review of the Question Presented by Petitioners.

This Court has refused to consider issues not preserved by proper objection, or otherwise abandoned, in the trial court. In *Kibbe*, 480 U.S. at 257, the Court dismissed a writ of certiorari as improvidently granted under circumstances almost identical to those presented here. Certiorari had been granted to resolve a question having to do with issues of municipal liability.<sup>22</sup> On plenary consideration, however, the Court found that those issues had not been properly preserved in the District Court, even though the Circuit Court of Appeals had written about them. This Court wrote:

We ordinarily will not decide questions not raised or litigated in the lower courts. See *California v. Taylor*, 353 U.S. 553, 556, n.2 (1957). That rule has special force where the party seeking to

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immunity from attaching in the first instance, or as invoking the *Noerr-Pennington* immunity “sham” exception. To be sure, *Noerr-Pennington* only comes into play if *Parker* is viewed as initially applying; if the government is shown not to be an independent actor due to involvement of its officers in a conspiracy, however, so that so-called “attempts to influence” its actions are in fact – as here – but “sham” acts in furtherance of the conspiracy, the restraints in question would come clearly under the head of private action. See, e.g., *Allied Tube & Conduit*, 486 U.S. at 492. To paraphrase *Allied Tube*, the issues of *Parker* and/or *Noerr-Pennington* immunity in this case thus collapse into the issue of antitrust liability.

<sup>22</sup> Under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).



argue the issue has failed to object to a jury instruction, since Rule 51 of the Federal Rules of Civil Procedure provides that '[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict'. 480 U.S. at 259 (emphasis added).

Here, Petitioners did not object properly to the jury charges on either the *Parker* or *Noerr-Pennington* issues. See *supra* at n.6. Indeed, as in *Kibbe*, Petitioners proposed an alternative instruction<sup>23</sup> that varies in no material fashion from the instructions the District Court actually gave. See *supra* at n.7. From identical conduct by the Petitioners in *Kibbe*, this Court found a waiver of the questions presented, which precluded Supreme Court review: "it appears that in the District Court petitioner did not object to the jury instruction stating that gross negligence would suffice . . . and indeed proposed its own instruction to the same effect." *Id.* at 258.

As in *Kibbe*, therefore, review of the Petitioners' Questions is precluded and the writ of certiorari should be dismissed as improvidently granted. In any event, however, the Petitioners' failure to object to the *Parker* and *Noerr-Pennington* instructions, and their proposal of a charge substantially identical to the ones given, prevent Petitioners from complaining of those instructions in this Court. *Sunkist*, 370 U.S. at 25-27. Unlike *Sunkist*, Petitioners here failed to make the timely and specific objections which permitted this Court's analysis there of the jury charges. *Id.* at 26-27. Because the jury charges here are effectively impervious, all sets of circumstances - all

<sup>23</sup> Discussed *supra* at p. 7.

scenarios - which the jury was told would lead to Petitioners' liability must be deemed legally correct, at least in this case. Moreover, under *Sunkist*, the jury's verdict must be read as tantamount to a finding of all liability scenarios within the scope of the jury instructions. *Id.* at 25-27.

**B. *Parker* and *Noerr-Pennington* do not apply where there has been a subversion or circumvention of the Governmental Process.**

**(i) *Parker***

This Court in *Parker v Brown* concluded that the Sherman Act prohibited individual and not state action, 317 U.S. at 352, while recognizing that in the case before it:

The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Id.* (citations omitted).

*Parker* thus signals this Court's view that conduct of the state itself in combination or conspiracy with private parties to restrain trade or establish monopolies is unlawful and unprotected under the Sherman Act because such conduct is not a valid act of government. This limitation upon the protection for state action has come to be known as the "co-conspirator exception." It also applies to immunity claimed under *Noerr-Pennington*. See *infra* at 38.

A number of federal courts, including this Court, have expressly recognized the co-conspirator exception to

state action immunity. E.g., *Commuter Transportation Systems, Inc. v Hillsborough County*, 801 F.2d 1286 (11th Cir. 1986) (co-conspirator exception recognized; however, state action immunity found for airport authority with power to limit competition in limousine service where plaintiff failed to show injurious conspiracy); *Greyhound Rent-A-Car, Inc. v City of Pensacola*, 676 F.2d 1380 (11th Cir. 1982), cert. denied, 459 U.S. 1171 (1983) (plaintiff must prove an illicit conspiracy to exclude the entity from state action immunity); *Whitworth v Perkins*, 559 F.2d 378 (5th Cir. 1977), vacated, 435 U.S. 992, aff'd on rehearing, 576 F.2d 696 (5th Cir. 1978), cert. denied, 440 U.S. 911 (1979) (the mere presence of a zoning ordinance does not necessarily insulate the defendants from antitrust liability where the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade). Subversion or circumvention of the legislative process is the underlying reason for the co-conspirator exception to *Parker*. This Court thus pointed out in *California Motor Transport v Trucking Unlimited*, 404 U.S. 508, 513 (1972), that "[c]onspiracy with a licensing authority to eliminate a competitor," or "bribery of a public purchasing agent" may violate the antitrust laws.

The essential point is that the joinder of private parties and governmental actors for their mutual personal benefit rebuts the presumption that governmental action is taken in the public interest.<sup>24</sup> *Allied Tube*, 486 U.S. at

<sup>24</sup> This approach has explicitly been recognized by the Fourth Circuit, Judge Chapman writing:

Actions taken to discourage and ultimately prevent competitors from meaningful access to the processes

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503-04 (evidence may rebut the presumption that government acts in the public interest). The sort of behavior by public servants shown here amounts to nothing less than a conspiracy with private persons for their economic benefit and the personal advantage of the conspiring officials. It results in the effective substitution of private business interests for true governmental judgment. When injury to competition results from this combination, no policy of the antitrust laws justifies this misconduct.

## (ii) *Noerr-Pennington*

The *Noerr-Pennington* doctrine provides an exception to antitrust liability enabling citizens or business entities to influence or to petition public officials to take official action that will harm or eliminate competition. *Eastern R.R. Presidents' Conference v Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v Pennington*, 381 U.S. 657 (1965). These cases grew, in part, from the state action doctrine announced in *Parker v Brown*, on the theory that efforts to secure valid governmental action

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of administrative agencies fall within the sham exception to *Noerr-Pennington* immunity. Thus, proof that appellants conspired to bring the chairman of the Central Planning Council and an assistant attorney general into their conspiracy, with the intent to foreclose HBC [plaintiff] from meaningful access to the Central Planning Council and the MCC, is within the sham exception to *Noerr-Pennington*.

*Hospital Building Co. v Trustees of Rex Hospital*, 691 F.2d 678, 687 (4th Cir. 1982) (citations omitted).



which was itself immune from antitrust attack should similarly enjoy immunity.<sup>25</sup>

In a recent decision involving the issue of whether joint efforts to influence the setting of a private electrical association's product standards, which were routinely adopted by state and local governments, qualified for *Noerr* immunity, this Court significantly clarified the sweep of the doctrine. In *Allied Tube*, 486 U.S. at 499, the Court reviewed the rule of *Noerr-Pennington* and stated:

The scope of this protection depends, however, on the source, context, and nature of the anti-competitive restraint at issue. "[W]here a restraint upon trade or monopolization is the result of *valid governmental action, as opposed to private action*," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. *Noerr*, *supra*, at 136; see also *Pennington*, *supra*, at 671. In addition, where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is "incidental" to a valid effort to influence governmental action. *Noerr*, *supra*, at 143. The validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity. (emphasis added).

<sup>25</sup> However, the fact that efforts to secure legislation are protected by *Noerr-Pennington* does not mean that the legislation ultimately enacted or conduct taken pursuant to such legislation will be shielded from antitrust review under *Parker v. Brown*. The doctrines, while related, are treated separately by the courts.

In *Allied* this Court found a sham under *Noerr-Pennington* where a quasi-legislative process had been subverted and circumvented even though no crime was committed. See *Hospital Building Co. v. Trustees of Rex Hospital*, 691 F.2d 678, 687 (4th Cir. 1982) (a private-public "conspiracy with the intent to foreclose [the plaintiff] from meaningful access to [a governmental body] is within the sham exception to *Noerr-Pennington*"); *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F.Supp. 892, 910 (D.Md. 1985), *aff'd*, 786 F.2d 202 (4th Cir. 1986).<sup>26</sup>

The dispositive issue is not whether government action is somehow "involved" in the challenged restraint, but whether the restraint originated in *valid* government,

<sup>26</sup> There the court said:

In determining whether the challenged conduct is protected or sham, the court must initially decide whether the immediate objective of the actor was to achieve his anticompetitive purpose by obtaining *legitimate governmental action* or by *abusing governmental process in order to prevent legitimate governmental decision-making*. . . . so understood, the sham exception serves the same purpose as the *Noerr-Pennington* doctrine of which it has become a part. The exception protects free speech and the governmental decision-making process by attaching liability to those who would act to muffle the voices of competitors seeking access to government. (emphasis added).

601 F. Supp. at 910; accord *Bieter Co. v. Blomquist*, 1990-1 Trade Cases, §69, 083 (1990 WL 107531) (D. Minn. 1990) (exploring the differences between protected "legitimate lobbying . . . [that] produces an anticompetitive effect" and "illegal conduct").



as opposed to *private*, action.<sup>27</sup> This Court thus in *Allied Tube* made clear that the *Noerr-Pennington* doctrine does not extend to "every concerted effort that is genuinely intended to influence governmental action." 486 U.S. at 503. See also *Federal Trade Comm'n v Superior Court Trial Lawyers Ass'n*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 768, 776 (1990):

If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports . . . Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms . . . Firms could claim immunity for boycotts or horizontal output requirements on the ground that they are intended to dramatize the plight of their industry and spur legislative action.

110 S.Ct. at 776, quoting *Allied Tube*, 486 U.S. at 503 (citations omitted).

The Petitioners asked for a charge based upon *Affiliated Capital Corp. v City of Houston*, 735 F.2d 1555 (5th Cir. 1984) (en banc), *reh'g denied*, 741 F.2d 766 (5th Cir. 1984),

<sup>27</sup> As the Fifth Circuit has noted, the presence of state participation in an antitrust claim signals not the conclusion of the inquiry, but rather "only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter. We reject 'the facile conclusion that action by any public official automatically confers exemption'." (citation omitted). *Woods Exploration & Producing Co., Inc. v Aluminum Co. of America*, 438 F.2d 1294 (5th Cir. 1971), *reh'g denied* (1971).

*cert. denied*, 474 U.S. 1053 (1986). (J.A. at 172-173). In *Affiliated*, cable TV contractors were selected by the city based on their "political power." *Id.* at 1557. The mayor "abdicated his responsibility," and the Fifth Circuit held that *Noerr-Pennington* immunity did not apply under a co-conspirator exception, even though the Plaintiff was nominally permitted to go before the city council. That en banc court applied the co-conspirator exception and/or the sham exception as necessary.

The policy behind the sham exception to *Noerr-Pennington* is that competitors in OMNI's (*Affiliated's*) position would become totally lost if it were permissible for the government to become part of a conspiracy, hold meaningless hearings or other proceedings, and then purport to "decide" what had already been determined (for reasons having nothing to do with the public trust) by the private co-conspirators in concert with the public officials who were perverting their offices. The sham exception does not come into play except when the rules of competition have been shredded by government and private actors conspiring.<sup>28</sup> The sham exception to *Noerr-Pennington* (or the co-conspirator exception) is thus the flip side of the *Noerr-Pennington* coin. (See, *supra* n.26).

<sup>28</sup> Petitioners also attempt to argue that the only co-conspirator exception to *Parker* ought to involve situations in which the government is in effect an enterprise partner with the private conspirator. (See Pet. Brief at 18-19). They erroneously cite to 1 P. Areeda & D. Turner, *Antitrust Law*, §212c, in support of this proposition.

Areeda and Turner were pointing out that such a situation was only one of several situations in which there would be no

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As in all "sham" exception cases, Respondent's damages flow from the denial of access to valid governmental process brought about by Petitioners' illegal agreement – not from any one governmental action or piece of legislation. See *Allied Tube*, 486 U.S. at 499-500. That is, OMNI's damages were caused by the *City/COA secret agreement* to take whatever action was required – not by one ordinance or another. Thus this case, like all "sham" exception cases, has nothing to do with the cases on which Petitioners rely, where inquiry into legislative motive, for the purpose of setting aside legislation, is eschewed. (See Pet. Brief at 19-20).

Respected commentators agree that *Noerr-Pennington* immunity simply does not apply here. As Professor Areeda puts it:

'Conspiracy' is not inapt where the member(s) of an official agency

- (1) Accepts a bribe;
- (2) Decides out of personal bias and for no other reason;
- (3) Decides in favor of a personal financial interest in privity with or perhaps even closely allied to that of one or more of the plaintiff's rivals, whether on the board or

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immunity. As they had previously written on the same page: "the quoted language reminds us that the Court was not eliminating all antitrust applications where state law or action is involved, that preexisting limits were not being overruled, and that room was reserved for future elaboration and development." *Id.*

not. (P. Areeda & D. Hovenkamp, *Antitrust Law*, Par. 203.3a, 203.3c, 1987 Supp., p.33)

These concerns, as documented by the evidence and verdict here, are particularly appropriate at the local government level, where the safeguards that tend to produce fair political decision making are often either tenuously present or entirely absent. (cf. *Allied Tube*, 486 U.S. at 502-03).<sup>29</sup>

Both cases and commentaries concur that heightened scrutiny of municipal government action is appropriate. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Calif. L.Rev. 837, 853-857 (1983) (Reasonable guarantee of due consideration to the public interest in large legislatures does not apply with regard to local legislative bodies).<sup>30</sup> See, also, *McDonald v*

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<sup>29</sup> Petitioners themselves acknowledge that the precipitous, knowingly illegal and unconstitutional act of the City in passing the initial moratorium against the advice of the City Attorney who told the Council of its unconstitutionality may suffice by itself to invoke the "sham" exception to *Noerr-Pennington*. (See Pet. Brief at 35, n.26.)

<sup>30</sup> As Rose observes:

However much or little local governments may structurally resemble the *Federalist* legislature in general, they are very unlikely to be restrained by the *Federalist* safeguards in making specific piecemeal land decisions. In making these decisions, which involve only a few interested parties meeting only on a single issue, legislatures are restrained neither by a coalition-building process that assures the fairness of the decisions, nor by a clash of interests that gives time for sober consideration. Courts should therefore

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*Board of Comm'rs*, 238 Md. 549, 210 A.2d 325 (1965) (Barnes, J., dissenting) (discussing political corruption in connection with local zoning decisions); *Cf. Chrobuck v Snohomish County*, 78 Wash. 858, 865, 480 P.2d 489, 494 (1971) (en banc) (contact between the company and zoning commissioners caused invalidation of the zoning decision); see also Hovenkamp and Mackerron, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. Rev. 719, 782-783 (1985); Deutsch, *Antitrust Challenges to Local Zoning and Other Land Use Controls*, 60 Chi. - Kent L. Rev. 63, 87-88 (1984) (antitrust laws should apply when governments are involved in "corruption, improper influence for the benefit of private individuals, and official's self-dealing"); and C. Haar & J. Kayden, *Landmark Justice* (1989).

Congress itself, through enactment of the Local Government Antitrust Act, 15 U.S.C. §§34-36, has recognized that municipalities may subject themselves to antitrust liability for their anticompetitive conduct. Although a municipality may obtain relief under the Act from damages liability for its antitrust violations, the municipality remains liable nonetheless and may be subject to equitable measures. *Id.*<sup>31</sup> Moreover, the relief from damages

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not assume that these safeguards have worked. If these decisions are to be found reasonable, the finding requires some alternative source of fairness and due consideration. Rose, *Planning and Dealing: Piece-meal Land Controls as a Problem of Local Legitimacy*, 71 Calif. L. Rev. 837, 856 (1983).

<sup>31</sup> The District Court here granted the City's motion for exclusion of damages liability, but let the issue of their liability for injunctive relief go to the jury. The Fourth Circuit properly directed the District Court, on remand, to fashion such relief.

afforded by the Act in no way extends to non-governmental co-conspirators, who remain fully liable for the damages caused by their conspiracy with public actors. *Id.*; see *Dennis v Spark*, 449 U.S. 24 (1980) ("no good reason for conferring immunity on private persons who persuaded the immune judge to exercise his jurisdiction corruptly").

### (iii) Proof of Subversion or Circumvention

The Fourth Circuit held that the following inferences, as examples, were amply supported by the jury verdict in view of the jury charges and the evidence (the sufficiency of which is not at issue):

- a. The City was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry. (Pet. App. 9a).
- b. Petitioners engaged in "private contacts and agreements [that] relate not to the purpose of attaining governmental action but solely to forcing competitors from a particular market." (Pet. App. 12a).
- c. "[T]he facts support a jury conclusion that COA's interaction with the mayor, City Administrators and members of the Council 'was actually nothing more than an attempt to interfere directly with the business relations of a competitor' or an attempt to harass and deter OMNI . . . [and] that COA's purposes were to delay OMNI's entry into the market and even to deny it a meaningful access to the appropriate city administrative



and legislative fora. The evidence, *for example*, supports inferences that COA instigated the Council's enactment of an unconstitutional ordinance even though the city attorney had advised of its probable unconstitutionality, and that COA encouraged the City's later instruction to its attorney to proceed with litigation to stall until a moratorium could be enacted." (Pet. App. 22a) (emphasis added).

- d. "[T]he jury verdict . . . necessarily reflected its findings that COA's actions were a 'sham' and, construing the evidence with appropriate deference to the verdict, it supports that finding." (Pet. App. 23a).

These actions by COA and the City, as conclusively established by the jury verdict, show a clear subversion and/or circumvention of the government process. Neither subversion nor circumvention of government is protected by *Parker* or *Noerr-Pennington*.

## II. CORRUPTION OF THE GOVERNMENTAL PROCESS SUSTAINS THE JUDGMENT

This Court has never recognized any immunity from antitrust liability under *Parker* or *Noerr-Pennington* for the corrupt use of governmental process. The abandonment of public responsibilities to private interests surely amounts to the corrupt use of governmental power. In *Allied Tube*, this Court recognized bribery or corruption of governmental process as being within the sham exception to *Noerr-Pennington*, 486 U.S. at 504. Again in *Allied*, this Court held that proof of "personal financial interests" on the part of public officials who impose restraints on trade means "that the restraint has resulted from private

action," *Id.* at 502, unprotected by *Parker*. The Court of Appeals' dissent acknowledged that both *Parker* and *Noerr-Pennington* immunities would be defeated by proof of illegal or fraudulent actions, or corrupt or bad faith decisions, or selfish or corrupt motives by Petitioners. (Pet. App. 44a, 48a). Petitioners themselves concede that proof of what they call "direct corruption," including bribes and personal financial interest, would show a "deviation from the legislators' presumed attention to the public interest," which would negate *Parker*. Still other federal courts, and this Court, have recognized the co-conspirator exception to *Parker*. *See supra* at p. 31. At bottom, however, it was within the jury's province to determine what constituted corruption of the governmental process in their community. In response to the express invitation of Petitioners' closing arguments to decide the case on the question of corruption, the jury returned a verdict against Petitioners that has a finding of corruption well within its ambit.

### A. Failure to request pertinent jury instructions precludes this Court's review of the Questions Presented of Petitioners.

Although Petitioners argued to the jury that this case was about political corruption,<sup>32</sup> they did not properly

<sup>32</sup> Respondent likewise treated corruption as part of this case all along. *See*, Resp. Answer to (4th Cir.) Pet. for Rehearing at 5 ("Appellees . . . completely ignore the evidence of corrupt motivation and mutual back scratching . . . which motivated the 1980 agreement to preserve the corrupt agreement between the City and COA . . ."); (4th Cir.) Brief for Appellant at 19

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request a charge that only "direct corruption" (Pet. Brief at 12, 24-25, 27) would support a verdict against them. See *supra* at n.9. They thus have not preserved, for this Court's review, the question of whether proof of "direct corruption" alone defeats *Parker* and *Noerr-Pennington* immunities. See *supra* at p. 28.

**B. *Parker* and *Noerr-Pennington* do not apply because of the proof of illegal, fraudulent, corrupt, bad faith or selfish actions by Petitioners.**

In view of the policies illuminating both *Parker* and *Noerr-Pennington*, the finding of corruption embraced by the jury's verdict properly could have rested on proof of the City's abandonment of its public responsibilities. Quite apart from that, however, proof of illegal or fraudulent action, or corrupt or bad faith decisions, or selfish or corrupt motives by Petitioners was well within the scope of the jury's verdict. See *supra* at p. 28. Surely this amounts to proof of what Petitioners call "direct corruption" of the governmental process which Petitioners themselves concede would sustain the judgment. (Pet. Brief at 12, 24-25, 27). That concession by Petitioners is consistent with, and mandated by, this Court's decision in

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(Petitioners' "scheme designed to shore up and perpetuate their illegal and mutually beneficial activities") and at 40 ("The City Officials and COA both benefited in corrupt ways from their mutual back scratching."); Resp. Summary Judgment Opposition Memorandum at 8 ("... illegal contacts with members of City Council"); and at 13 ("... the City and COA were engaged in mutual back scratching").

*Allied* and the law as acknowledged by both the majority and the dissent in Fourth Circuit.

The jury finding of corruption results not just from the instructions concerning, *inter alia*, "illegal agreements" and "illegal arrangements," or from the evidence, or from Petitioners' closing argument inviting the jury's decision on the "corruption" issue. Beyond the instructions, the evidence and the summation, the jury was empowered to bring its common sense and logic to bear in deciding this case. Plainly the jury's common sense and logic could have led it to conclude that what this case revealed was, in Petitioners' words, "government corruption. No matter how you slice it." (J.A. at 57).

Several other factors reinforce the reasonableness of the jury's appraisal. For example, the standards that would have guided a jury in determining government corruption under the Hobbs Act, 18 U.S.C. §1951, were satisfied here. *United States v McCormick*, 896 F.2d 61, 66 (4th Cir. 1990), *cert. granted*, \_\_\_ U.S. \_\_\_ (1990). As the Fourth Circuit said:

"if payments to elected officials are not treated as legitimate campaign contributions by either the payor or the official, then a jury may reasonably infer that these payments are also induced by the official's office in violation of the Hobbs Act," [setting standards for assessing the legitimacy of campaign contributions, including:] "(1) Whether the money was recorded by the payor as a campaign contribution, (2) whether the money was recorded and reported by the official as a campaign contribution, (3) whether the payment was in cash, (4) whether it was delivered to the official personally or to his campaign, (5) whether the official acted in his



official capacity at or near the time of the payment for the benefit of the payor or supported legislation that would benefit the payor, (6) whether the official had supported similar legislation before the time of the payment, and (7) whether the official had directly or indirectly solicited the payor individually for the payment."

The jury had heard evidence from Mr. Cantey, for example, that he understood that if a company did favors – such as providing free or reduced-cost billboard space – for a politician, it expected the politician to do favors in return: a classic Hobbs Act "*quid pro quo*." *United States v Barber*, 668 F.2d 778, 784 (4th Cir. 1982) (providing free liquor to government officials in return for "favors" violated the Hobbs Act). (Cf. *United States v Dozier*, 672 F.2d 531 (5th Cir. 1982)). Further, there was no doubt that such favors were provided by COA to politicians, including specifically the City politicians here involved. The jury from this had reason to find a pattern and practice of the City and COA exchanging favors. *United States v Aguon*, 851 F.2d 1158 (9th Cir. 1988) (en banc); *United States v Mazzei*, 521 F.2d 639 (3d Cir. 1975) (en banc), cert. denied, 423 U.S. 1014 (1975). The provision of free or reduced-price, strategically-placed billboard space in return for control of access to the market – since at least 1980, and with regard then to another competitor, according to the proof before the jury (Pet. Ann. 13a) – clearly establishes the motive and inducement.<sup>33</sup>

<sup>33</sup> Inducement can be inferred, of course, from an expectation of mutual back-scratching even in the absence of express

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As members of the same community as Petitioners, moreover, the jurors may well have understood that corruption is a way of life in political South Carolina.<sup>34</sup> In using their common sense to fit together the evidentiary puzzle in this case, the members of the jury may have used that understanding to reach the conclusion, implicit in their general verdict, that Petitioners here had corrupted the municipal government process.

Indeed corruption, if that be deemed the test, is undoubtedly established by the abandonment and relinquishment of governmental responsibilities to a private

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inducement by the officeholder. Moreover, the payments still amount to government corruption in the form of bribery. Cf. *U.S. v Aguon*, 851 F.2d 1158 (9th Cir. 1988) (en banc). Judge Aldisert of the Third Circuit explained the distinction in dissent in *United States v Cerilli*, 603 F.2d 415, 435 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980):

A public official charged with extortion under the Hobbs Act should be able to argue that although he did in fact receive something of value, it was given at the initiative of the donor, and not as a result of force, fear or duress emanating from the defendant. Thus, in an indictment for extortion, it is logically and jurisprudentially sound to permit a defense of bribery. To hold otherwise is to blur completely the distinction between the two crimes.

Of course, the crimes are still crimes. And they both amount to "government corruption. No matter how you slice it."

<sup>34</sup> E.g., There is a current Hobbs Act investigation and prosecution of members of the South Carolina legislature in Columbia, focusing on bribery and corruption among legislators and perhaps other State officials. N.Y. Times, July 22, 1990, Section 1, page 16.



monopolist. This was clearly demonstrated by the 1980 secret agreement to allow COA to use the City's resources and power to ensure COA's monopolistic position and the City Council members their politically crucial, free and/or discounted, strategically-placed, and/or stolen billboard space.<sup>35</sup>

A fundamental point for this Court is both simple and clear: whether the conduct of Petitioners be called "directly corrupt," "corrupt," or "subversion or circumvention of the governmental process," the end result is the same - OMNI has been unfairly, wrongly, and without any policy justification deprived of the right to compete in the outdoor advertising market in Columbia, S.C. OMNI has been denied the right to compete unhampered by governmental coercion resulting from an abuse of the public trust through a conspiracy. Petitioners wish to have this Court articulate a "direct corruption" standard setting out a "bright line" rule to serve the interests advanced by certain amici. Respondent submits that this would do no favor to the nation, since exclusion from competition through subversion or circumvention is no less harmful than is exclusion through "direct corruption" as Petitioners seem to suggest. Respondent does not believe that the "direct corruption" test would be any simpler than the existing guideline of subversion or circumvention of the governmental process.

However, Respondent respectfully submits that whatever the approach taken by this Honorable Court,

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<sup>35</sup> Corruption of governmental process through an illegal conspiracy is illegal advocacy and not protected by the 1st Amendment as Petitioners concede. (Pet. Brief at 32).

the evidence upon which the jury found a conspiracy meets that requirement.

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### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 89-1671

Supreme Court, U.S.

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CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

CITY OF COLUMBIA and  
COLUMBIA OUTDOOR ADVERTISING, INC.,  
v. *Petitioners,*  
OMNI OUTDOOR ADVERTISING, INC.,  
*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

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No. 89-1671

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CITY OF COLUMBIA and  
COLUMBIA OUTDOOR ADVERTISING, INC.,  
v. *Petitioners,*

OMNI OUTDOOR ADVERTISING, INC.,  
*Respondent.*

---

On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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Respondent presents three arguments: (1) that petitioners have waived their present claims because they failed to make proper objections below; (2) that the *Parker* and *Noerr* doctrines do not apply because petitioners "subverted" the governmental process by "agreeing" to ordinances that benefited COA; and (3) that, if proof of corruption is required in this case, the evidence satisfied that standard as well. None of these arguments has merit.

1. Respondent's opening contention is that "[p]etitioners' conduct at trial waived the questions concerning *Parker* and *Noerr-Pennington* they seek to present to this Court." Resp. Br. 25. See also *id.* at 29-31, 43-44. Ironically, respondent has waived its "waiver" claim. To rely

on an argument in this Court, a respondent is required to have raised it at some point below, absent exceptional circumstances not present here. *See, e.g., Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987). Respondent never did so, not even when petitioners moved for judgment n.o.v. on the same grounds that they now advance, *see infra* note 3,<sup>1</sup> or when respondent appealed the district court's entry of judgment n.o.v.<sup>2</sup> Moreover, respondent did not comply with Supreme Court Rule 15.1, which requires that such waiver arguments be raised in the brief in opposition to certiorari or they "may be deemed waived." *See also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

In any event, the suggestion that *petitioners* have waived their current claims is groundless. The sole basis for this contention is that petitioners "failed to make proper objections to the District Court's legal instructions [to the jury]." Resp. Br. 25. That argument is simply irrelevant in this case, however. Petitioners presented their claims through appropriate legal motions at all required times.<sup>3</sup>

<sup>1</sup> Far from raising a waiver claim, respondent tried to defeat the j.n.o.v. motion on exactly the opposite basis. It argued that petitioners "have based their motion on grounds argued at summary judgment, directed verdict after Plaintiff's case and directed verdict after the close of evidence." Pl. Mem. in Opp. to Mot. for J.N.O.V. (March 20, 1986) at 1.

<sup>2</sup> Respondent asserts that "[t]he Fourth Circuit correctly noted there were no proper objections made to the jury instructions. (Pet. App. 37a)." Resp. Br. 6 (footnote omitted). In fact, however, after addressing petitioners' legal claims on the merits at length, the Fourth Circuit said only the following about the instructions: "Finally, we find no sufficient *merit* to warrant reversal in the defendants' broadside attack on the district court's instructions." Pet. App. 37a (emphasis added).

<sup>3</sup> The City raised the following arguments in the district court: (1) that its conduct was protected because the ordinances, on their face, satisfy *Town of Hallie* (and *City of Boulder* before that), City's Supp. Tr. Mem. (Jan. 18, 1986) at 4-9; Mem. Br. in Support of Def. City's Motion to Dismiss (Dec. 6, 1982) at 5-12; (2) that

These claims sought judgment as a matter of law, not a new trial with proper instructions. They are thus cognizable in this Court regardless of objections to the jury instructions. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) ("the focus of petitioner's challenge is not on the jury instruction itself, but on the denial of its motions for summary judgment and a directed verdict") (plurality opinion).<sup>4</sup>

Petitioners' only claim concerning the jury instructions appears in corresponding footnotes in our main brief.

an agreement to enact legislation favorable to COA does not make petitioners "co-conspirators" absent a showing of "illegal or fraudulent inducement by COA of city officials," City's Mem. in Support of Mot. for S.J. (Aug. 8, 1984) at 7-8, or "bribery or other illegal acts," City's Supp. Tr. Mem., *supra* at 8; and (3) that the City's actions were immune regardless of its subjective motive. *Id.* at 6-9. *See also* Mem. in Support of Def. City's Mot. for J.N.O.V. (Feb. 10, 1986). Those arguments were also advanced on appeal. Jt. Br. of Appellees at 13-26.

COA raised the following arguments in the district court: (1) that lawful but successful lobbying activity cannot make petitioners "co-conspirators," COA's Reply Mem. in Support of Mot. for S.J. (Oct. 10, 1984) at 3-7; (2) that even if COA committed illegal acts, such as bribery or slander, its actions are nonetheless protected by *Noerr*, *id.* at 8-9; and (3) that COA's lobbying cannot constitute a "sham" because it was genuinely intended to influence the City to enact the ordinances, *id.* at 9-10. *See also* COA's Reply to Pl. Supp. Pre-Tr. Mem. (Jan. 8, 1986); COA's Mot. for J.N.O.V. or in the Alternative Mot. for New Tr. or New Tr. Nisi (Feb. 18, 1986); COA's Post-Tr. Mem. (March 10, 1986); COA's Supp. Mem. (June 23, 1986); COA's Second Supp. Mem. (Dec. 6, 1986). Those arguments were also advanced on appeal. Jt. Br. of Appellees at 28-54.

<sup>4</sup> While ignoring *Praprotnik*, respondent mistakenly relies on an earlier case, *City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257 (1987). Resp. Br. 29-31. The merits issue in *Kibbe* was whether the jury needed to find the city grossly negligent or something greater (*e.g.*, reckless) to support section 1983 liability in a failure-to-provide-proper-training case. The Court dismissed the writ as improvidently granted for several reasons, including that the city had neither objected to the jury instructions nor raised its objection on appeal, and the court of appeals had thus not considered it. *Kibbe*, 480 U.S. at 260.



Pet. Br. 23 n.23 & 31 n.27. There we argued that, assuming there were a corruption exception to *Parker* and *Noerr*, and assuming the record actually contained sufficient evidence to call that exception into play, a new trial would be required because the instructions were too broad to sustain the judgment on that narrow ground. This claim is also cognizable. Prior to the jury instructions, the trial court had repeatedly ruled that the appropriate legal standard for finding an antitrust "conspiracy" between the City and COA was the existence of an *agreement*, not corruption. See *supra* note 3. Yet another objection by petitioners, raising the same claim at the time of the instructions, would thus have been pointless. Indeed, the district court rejected petitioners' more modest request for an instruction prohibiting liability based on legitimate lobbying efforts.<sup>5</sup> In these circumstances, petitioners' failure to request a "corruption" instruction does not bar them from now raising a conditional new

<sup>5</sup> Petitioners proposed the following instruction:

You may not infer that any member of the City Council was participating in or acting in furtherance of a conspiracy simply because that person accepted or agreed with a position urged by a party. A public official's communications with a constituent, even if that public official thereby is influenced to favor the constituent, is within the parameters of the legislative process and cannot violate the antitrust laws so long as the official's activities are not the product of an illegal arrangement.

Likewise, you may not infer that any member of City Council was acting in furtherance of an illegal arrangement or conspiracy merely because that official may have received campaign contributions from COA.

Defendants' Proposed Instruction 19 (Exh. O to COA's Mot. for J.N.O.V. (Feb. 18, 1986)). See also J.A. 172-73 (similar instruction concerning COA's liability).

Petitioners also objected to the instructions actually given, claiming that they allowed the jury to find a conspiracy based on a successful lobbying effort. J.A. 109-10. The district court denied the objection even as it stated, "I am a little concerned about the possibility that I said that lobbying itself may be a conspiracy." *Id.* at 112.

trial-claim. See 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2553, at 639-40 & n.55 (1971) (collecting cases); cf. *Praprotnik*, 485 U.S. at 119-20.

2. Respondent next argues that *Parker* and *Noerr* do not apply here because there is evidence "rebut[ting] the presumption that government acts in the public interest." Resp. Br. 33 (citations omitted). See also *id.* at 37. To uphold the verdict on that ground, in turn, respondent claims that the record supports the following conclusions: (a) that the City acted "solely to further COA's commercial purposes to the detriment of competition"; (b) that petitioners entered into "agreements . . . to forc[e] competitors from a particular market"; and (c) that petitioners' efforts were a "sham," designed to "harass" respondent and "deny it a meaningful access to the appropriate city administrative and legislative fora." Resp. Br. 41-42.<sup>6</sup> This approach, as we explained in our opening brief, is inconsistent both with this Court's decisions and with the policies animating *Parker* and *Noerr*. See Pet. Br. 12-20, 24-25.<sup>7</sup>

<sup>6</sup> The "evidence" that respondent cites in support of these propositions is presented in a misleading, if not inaccurate, manner. For example, respondent asserts that "COA knew of the upcoming moratorium change, while OMNI did not." Resp. Br. 19. To support this claim, respondent notes that between March 9 and March 24, 1982, COA obtained permits for ten new billboard locations. The record also demonstrates, however, that (1) during precisely the same period Omni received *twelve* new permits in anticipation of the moratorium, C.A. App. 3619-30, and (2) the moratorium prohibited both COA and Omni from exercising these recently acquired permits, *id.* at 3771-76. Respondent's accusations that the City knew the moratorium ordinance was unconstitutional when it was passed, Resp. Br. 12, 16, and that "COA [was allowed] tax advantages to the detriment of the City," *id.* at 12, are also incompatible with the record. See C.A. App. 1753-55, 1880, 2042-43.

<sup>7</sup> *Amicus curiae* Associated Builders and Contractors, Inc. ("ABC") makes essentially this same argument, but limits it to *Parker* immunity. See ABC Br. 3 ("intent to serve the public interest"). To support its position, ABC relies on a sentence from *Town of Hallie* stating "[w]e may presume, absent a showing to the con-



To support its contrary conclusion, respondent relies almost exclusively on the Court's recent decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), which held that when "an economically interested party exercises decisionmaking power in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any liability flowing from the effect the standard has of its own force in the marketplace." *Id.* at 509-10 (emphasis added). That holding, however, does not even apply to *Parker* immunity and, as to *Noerr*, it cannot be stretched to cover the very different case of a private party that seeks passage of a protective ordinance, where the harm to competitors results solely from the adoption of the ordinance. On the contrary, the Court in *Allied Tube* expressly distinguished the two situations, explaining that there was no basis for according private standard-setting organizations "the same wide latitude given [even] ethically dubious efforts to influence legislative action in the political arena." 486 U.S. at 504; see also *id.* at 502. Thus, *Allied Tube* supports petitioners' position, not respondent's.<sup>8</sup>

trary, that the municipality acts in the public interest." *Id.* at 6 (quoting 471 U.S. at 45). But the whole thrust of the Court's decision in that case was to emphasize the need for *objective*, non-intrusive antitrust standards so that municipal officials would not be deterred from doing their jobs. See Pet. Br. 14-18. One general statement, noted in passing, does not undo the opinion's basic rationale.

ABC takes a different tack with respect to *Noerr*, arguing that, even when petitioning is successful, it may still be a sham if its purpose was to delay, not prevail. ABC Br. 13-20. The argument has no relevance here, however. There is no question that COA's efforts were genuine and that the harm to respondent resulted not from the effects of the government process itself, but rather from the outcome of that process—i.e., the passage of the ordinances. See C.A. App. 1243; see also Pet. App. 33a.

<sup>8</sup> Respondent also argues that "Congress . . . has recognized that municipalities may subject themselves to antitrust liability for their

3. Respondent's final argument is that "corruption of the governmental process sustains the judgment." Resp. Br. 42. This argument is flawed in two respects. To begin with, it glosses over the fundamental question whether there is a proper basis for creating a corruption exception to *Parker* and *Noerr* in the first place. Pet. Br. 14-20, 24-30. Second, even assuming that such an exception were warranted, it would not have been satisfied by the evidence in this case.

Respondent attempts to avoid having to justify a corruption exception by asserting, first, that "[p]etitioners themselves concede that proof of what they call 'direct corruption' . . . would negate *Parker*." Resp. Br. 43. See also Resp. Br. 48 n.35 (stating that petitioners concede that "illegal advocacy [is] not protected by the 1st Amendment"). Far from conceding these points, however, we

anticompetitive behavior." Resp. Br. 40 (citing 15 U.S.C. §§ 34-36). It is clear, however, that this statute did not establish *substantive* standards for antitrust liability of municipalities or, indeed, endorse any such liability. See H.R. Rep. No. 965, 98th Cong., 2d Sess. 2, reprinted in 1984 U.S. Code Cong. & Admin. News 4602, 4603 ("the bill eliminates certain damage suits under the Clayton Act without altering judicial interpretation of the substantive antitrust law").

Respondent's reliance on Professor Areeda's treatise is likewise improper. To create an impression of support, respondent first omits (without ellipsis) the word "necessarily" from the treatise's statement that: "'Conspiracy' is not necessarily inapt [in certain specific circumstances described below]." See Resp. Br. 38-39 (citing P. Areeda & D. Hovenkamp, *Antitrust Law* ¶ 203.3c (Supp. 1987)). It then leaves out the critical explanation that goes with the modifier: "To say that a conspiracy notion is not totally inapt is not, of course, to recommend that bribes, personal financial interest, or personal bias should be grounds for antitrust liability. Bribes may be provable although antitrust remedies may not be the most appropriate vehicle. Personal financial interest is also provable, although conflict of interest regulation seems more suitable than antitrust liability. Personal bias is so inherently unprovable that it should be ignored altogether." P. Areeda & D. Hovenkamp, *supra* ¶ 203.3c, at 33-34.

explicitly argued to the contrary. See Pet. Br. 18-20, 27.<sup>9</sup> Next, respondent states that in *Allied Tube* "this Court recognized bribery or corruption of governmental process as being within the sham exception to *Noerr-Pennington*, 486 U.S. at 504." Resp. Br. 42. See also *id.* at 42-43 (quoting 486 U.S. at 502). But that view is simply not supported by the Court's opinion, either at the pages cited by respondent or anywhere else.<sup>10</sup>

Even assuming there were a corruption exception to *Parker* and *Noerr*, moreover, it would not apply here because the evidence does not support such a finding.<sup>11</sup> Respondent points to a handful of campaign contributions

<sup>9</sup> Respondent similarly confuses the dissent below, asserting that it recognized a corruption exception. Resp. Br. 43. In fact, the dissent expressed some "doubt" about the issue, but felt no need to resolve it because the record contained no "proof of an illegal act or a selfish or a corrupt motive on the part of Columbia city officials." Pet. App. 48a.

<sup>10</sup> On the contrary, *Allied Tube* indicated that the "sham" exception does not apply where, as here, an individual genuinely attempts to achieve a favorable governmental decision, even if he uses improper methods. 486 U.S. at 507 n.10. Moreover, the only thing that *Allied Tube* said about a potential co-conspirator exception—an issue that was not presented in that case—is that, in yet another case, the Court had stated "*in dicta* that '[c]onspiracy . . . or bribery . . . may violate the antitrust laws.'" 486 U.S. at 502 n.7 (second emphasis added) (citation omitted).

<sup>11</sup> Respondent never defines the actions that would fall within its "corruption" exception. Instead respondent variously lists "abandonment of public responsibilities to private interests," "bribery," and "illegal or fraudulent actions, or corrupt or bad faith decisions, or selfish or corrupt motives by Petitioners" as potential components of such an exception. Resp. Br. 42-43. Apparently still unable to ensure that the exception would cover petitioners, respondent ultimately concludes: "At bottom, however, it was within the jury's province to determine what constituted corruption of the governmental process in their community." *Id.* at 43. This attempt to transform *Parker* and *Noerr* into an open-ended, obscenity-like standard, see *Miller v. California*, 413 U.S. 15, 25 (1972), is fundamentally misguided.

that COA or its executives gave to city officials over a six-year period and claims that they prove corruption. Resp. Br. 25, 46. The contributions at issue, however, were authorized by South Carolina law, openly reported on each candidate's Campaign Disclosure Form, small in amount, and fully consistent with COA's general policy regarding contributions to charitable organizations and public officials.<sup>12</sup> These circumstances do not warrant a hint of suspicion, let alone a finding of corruption.<sup>13</sup>

<sup>12</sup> In addition to three cash contributions (ranging from \$50 to \$140), Pet. Br. 6 n.6, COA provided the Mayor with six free billboards in 1978, which he disclosed on his Campaign Disclosure Form. C.A. App. 3263. This contribution is consistent with COA's general practice of providing hundreds of free billboards each year to clients, politicians, and charitable organizations, such as the Red Cross, United Fund, Shriner's Burn Hospital, and the Girl Scouts. *Id.* at 1421-22. It is also a standard practice in the industry, followed as well by respondent. *Id.* at 436-38.

After this suit was filed, two of the councilmen purchased billboard space from COA. Both were charged somewhat less than the price reflected on COA's rate card—at most, a one-third discount, amounting to approximately \$250. Compare *id.* at 2760-61 with *id.* at 2922, 3216. This practice is also customary in the industry, see *id.* at 1629-30, 1646-47; in fact, the discounts provided to these councilmen were the same as or less than those given by COA to other clients. See *id.* at 1524; compare *id.* at 2762, 2765, 2863 with *id.* at 2760-61. Both councilmen reported the amounts paid to COA for the billboards as itemized expenditures on their Campaign Disclosure Forms. *Id.* at 3254, 3256.

<sup>13</sup> Respondent's reliance on *United States v. McCormick*, 896 F.2d 61, 66 (4th Cir.), cert. granted, 59 U.S.L.W. 3211 (U.S. Oct. 1, 1990), to suggest that the facts in this case would support a Hobbs Act, 18 U.S.C. § 1951, conviction is inappropriate. In that case, after a lobbyist was contacted by a government official complaining that "his campaign was expensive, that he had not 'heard from' [the lobbyist's clients]," *id.* at 63, the lobbyist hand-delivered five successive cash payments totaling several thousand dollars that were never reported as campaign contributions by either the candidate or the lobbyist, as required by state law. Although the Fourth Circuit upheld the conviction, it recognized that, even on those facts, the case ultimately turned on a "fine distinction" between legitimate campaign contributions and a violation of the Hobbs Act. *Id.* at 65.



Apparently aware of its inability to support a corruption finding based on the evidence, respondent seeks to fill the gap by arguing that "[a]s members of the same community as Petitioners, moreover, the jurors may well have understood that corruption is a way of life in political South Carolina." Resp. Br. 47 (footnote to Hobbs Act investigation of several South Carolina legislators). But that kind of "guilt by association" argument is as speculative as it is offensive. Respondent argued to the jury that corruption was not required (indeed, that the purest of motives would not be a defense here), J.A. 59; moreover, the jury was never instructed that it had to find corruption to rule for respondent, *see* J.A. 78-79. Thus, in no event could the verdict be affirmed on the basis of a corruption finding.

#### CONCLUSION

The judgment of the court of appeals should be reversed.

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BRIEF OF THE OUTDOOR ADVERTISING  
ASSOCIATION OF AMERICA, INC.  
AS *AMICUS CURIAE*

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BRIEF OF THE OUTDOOR ADVERTISING  
ASSOCIATION OF AMERICA, INC.  
AS AMICUS CURIAE

---

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3 of the Rules of this Court, the Outdoor Advertising Association of America, Inc. ("OAAA") has secured the consent of all parties to this litigation to the filing of this brief as AMICUS CURIAE. The brief does not support the position of either party.

The OAAA is the trade association of the standardized outdoor advertising industry. The members of

the OAAA, who comprise a majority of the outdoor advertising companies in the United States, maintain billboards in 7,900 distinct local geographic market areas. The Association's members are predominantly small locally-based businesses. Other members of the OAAA are much larger and operate on a regional or national scale.

The OAAA believes that the standards adopted by the United States Court of Appeals for the Fourth Circuit in the decision below are so vague that, as a practical matter, it is impossible to know when the lawful activity of petitioning the government may lose its First Amendment protection and give rise to a violation of the Sherman Act. This is a matter of vital concern to the outdoor advertising industry which has been severely affected by regulation and must petition government on all levels on a regular basis to insure that it can retain sufficient billboards to remain competitive with other mass media.

In addition, because of the imprecision with which the Court of Appeals has used its "conspiracy" and "sham" standards, a serious shadow has been cast on the ability of interested parties to achieve legislative compromise through petitioning and negotiating with the government where the results may have a potential impact on competition within that industry. Indeed, it is unclear how and to what extent the Fourth Circuit's decision may adversely affect many such compromise measures that have already been implemented in a broad spectrum of localities and states.

The OAAA respectfully submits this brief in order to bring these matters to the Court's attention and to impress upon the Court the critical need for the

establishment of a clear standard under which an act of petitioning the government which is not otherwise illegal, corrupt or coercive will be shielded from antitrust liability under the *Noerr/Pennington* doctrine.

#### STATEMENT OF THE CASE

In this case, the United States Court of Appeals for the Fourth Circuit found that there was sufficient evidence in the record below to find that the City of Columbia, South Carolina and Columbia Outdoor Advertising, Inc. ("COA") had engaged in a "conspiracy" and a "sham" when COA successfully petitioned the City of Columbia to enact a restrictive billboard ordinance. The Fourth Circuit reached this conclusion despite the apparent lack of evidence of any overt illegal act, such as bribery, corruption or coercion.

The restrictive Columbia ordinance apparently had the effect of preventing a new entrant into the Columbia, South Carolina outdoor advertising market, Omni Outdoor Advertising, Inc., from building outdoor advertising signs in Columbia, while permitting COA to retain its existing signs. Because it found that there was a "conspiracy" and a "sham," the Fourth Circuit held that the actions of COA and the City of Columbia were not protected from antitrust liability by the *Noerr/Pennington* and *Parker v. Brown* doctrines.

#### SUMMARY OF ARGUMENT

The imposition of stringent federal, state and local land use controls has caused a sharp reduction in the number of billboards in the United States and forced a significant concentration of ownership within the outdoor advertising industry. Because of the imposi-



tion of this comprehensive regulatory structure, outdoor advertising companies are regularly required to petition the legislative and executive branches of government on all levels and to develop ongoing relationships with governmental units in order to prevent new restrictions which would further threaten their continued viability as a principal medium of mass communications.

The Fourth Circuit decision in *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127 (4th Cir. 1989), does not provide clear guidelines for determining when the lawful act of petitioning the government metastasizes into a violation of the Sherman Act. It also has had a pronounced chilling effect on conduct once thought to be lawful under the *Noerr/Pennington*<sup>1</sup> and *Parker v. Brown*<sup>2</sup> doctrines.

Although the OAAA does not support either party in this case, the Association is deeply concerned that a clear standard of conduct emerge from the resolution of this case. The need for such a clear standard becomes obvious by examining the potential impact of the Fourth Circuit's "conspiracy" and "sham" tests on a broad spectrum of negotiated agreements throughout the United States that have been devised jointly by outdoor advertising companies and local governments as an alternative to protracted litigation. OAAA believes that this Court should articulate a standard under which an act of petitioning the government which is not otherwise illegal, corrupt or

<sup>1</sup> *Eastern R.R. Pres. Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961), and *UMWA v. Pennington*, 381 U.S. 657 (1965).

<sup>2</sup> *Parker v. Brown*, 317 U.S. 341 (1943).

coercive will be shielded from antitrust liability under the *Noerr/Pennington* doctrine.

## ARGUMENT

### I. Outdoor Advertising is a Major Medium of Mass Communications

OAAA believes that it can best assist this Court by providing it with an understanding of how the Fourth Circuit's opinion will affect future activities by the outdoor advertising industry as the industry's activities relate to petitioning the government. OAAA also believes that the issues raised by this brief are representative of those that will confront commercial interests that desire to petition the government in the future.

In order to understand the impact of the Fourth Circuit's decision and the need for clarification by this Court of where protected conduct loses the immunity accorded by the *Noerr/Pennington* and *Parker v. Brown* doctrines, it is important to understand certain fundamental facts regarding the outdoor advertising business and the regulatory environment within which this industry operates.

#### A. The Business Dynamics of the Outdoor Advertising Industry

Billboards have been a primary medium for the dissemination of commercial and non-commercial information since the inception of the United States. Gallo, *The Poster In History*, American Heritage Pub. Co., 1972. Indeed,

[t]he outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or



"broadside" to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes.

*Metromedia, Inc. v. San Diego*, 453 U.S. 490, 501 (1981) (White, J.) (quoting the dissenting opinion of Justice Clark in *Metromedia v. San Diego*, 26 Cal. 3d 848, 888, 610 P.2d 407, 430-31, 164 Cal. Rptr. 510, 533-34 (1980)).

Despite strong competition from broadcast and print media, billboards remain an important mass medium because of their relatively low cost and the efficiency with which they communicate effectively to the public. Outdoor advertising has also retained its importance because, like all other media, it has certain unique communications capabilities. Thus, the simple statement "Vote for Smith—The People's Choice" would command little attention when broadcast on the radio or interspersed with many other advertisements in a newspaper or a magazine. But the same message gains considerable impact when disseminated on a billboard.

In order to compete effectively with other mass media which offer advertising in standard formats measured in seconds or page size, billboards are now principally constructed in three standard size formats. An advertiser may purchase 12' x 24' poster panels that are posted monthly with pre-printed copy that is temporarily affixed to the panel surface. These signs usually are strategically dispersed in permitted zones throughout a geographic market area. The industry also constructs 14' x 48' bulletins which are located more selectively on heavily travelled streets and highways and are hand painted for each message. In ad-

dition, some outdoor advertising companies offer 6' x 12' "junior panels" that are posted mostly with pre-printed copy. "Junior panels" usually are concentrated in urban areas.

The outdoor advertising industry also has developed a sophisticated method of audience analysis that is analogous to broadcast audience ratings systems and newspaper and magazine circulation statistics. This enables each outdoor advertising company to determine the size and demographic characteristics of those who view each of its signs. With this data, the outdoor advertising industry is able to compete with the other "measured media" by selling billboards in packages which will provide an advertiser with a specific number of potential exposures or "Gross Rating Points" within a given market. Advertising Age, "Out-of Home Media Supplement" (March 10, 1980). For example, political candidate Smith may purchase a preaudited package of poster panels that will provide a potential exposure for "Vote for Smith—The People's Choice" to audiences of from ten to one hundred percent of the population in a particular geographic market between the ages of 18-55 years.

Moreover, because billboards often can be used to target portions of a market, they are often regarded as more "efficient" than other media, which generally can only deliver a message market-wide. If Candidate Smith only wants to reach the residents of Ward 3 of a city, he can target those residents by only advertising his message on billboards that are oriented to traffic in that portion of the city. Thus, in order to remain viable and compete effectively with alternative media, an outdoor advertising company must

maintain a sufficient number of signs to meet the diverse needs of a substantial number of advertisers.

**B. Intense Regulation of The Outdoor Advertising Industry Has Substantially Affected Competition In the Industry**

Earlier in this century, billboards proliferated in a largely unregulated environment. Few other competing mass media were in existence. Since then, an intensive regulatory structure has developed on all governmental levels which has dramatically reduced the number of billboards and resulted in a concentration of ownership within the outdoor advertising industry. In addition, other mass media have become significant competition.

In 1965, the Congress enacted the Highway Beautification Act, 23 U.S.C. sec. 131 (1965), which imposes substantial penalties upon any state that fails to adopt minimum controls over those billboards contiguous to the federal-aid primary and interstate highway systems. These systems comprise the nation's principal highway arteries. The Highway Beautification Act requires states to confine billboards to commercial and industrial areas and to adopt additional restrictions controlling size, the spacing between adjacent billboards and the manner in which they are illuminated. Finally, the Act requires, that upon payment of just compensation, the states must remove those nonconforming billboards which do not otherwise conform to the federal minimum regulations. 23 U.S.C. 131(g). Although the Highway Beautification Act sets a baseline standard, the states are free to adopt more rigorous standards and to regulate the remaining billboards along other roads that do not fall within the ambit of the Act. 23 U.S.C. 131(k).

Every state has adopted regulations that comply with the requirements of the Highway Beautification Act. In fact, many states have gone beyond the requirements of the Act to implement far more rigorous constraints. For example, Hawaii, Vermont and Maine have chosen to prohibit all outdoor advertising. *See, e.g.,* Hawaii Rev. Stat. sec. 445-111; Me. Rev. Stat. Ann. tit. 23, sec. 1901; Vt. Stat. Ann. tit. 10, sec. 14. By the mid-1970's these states had eliminated virtually all billboards within their boundaries through condemnation and payment of just compensation. However, most states have recognized the importance to society of maintaining the outdoor medium of expression and have chosen to regulate billboards with varying degrees of severity. Oregon, Texas and Rhode Island each have fixed the total number of signs that they will allow and have created certain vested rights in the owners of those signs to the underlying sign permits. *See, e.g.,* Or. Rev. Stat. sec. 377.700; Tex. Stat. Ann. art. 6674-v (Vernon). Other states have imposed very rigorous spacing requirements or have prohibited billboards from certain highway systems within their boundaries. *See, e.g.,* Cal. Sts. & Hy. Code sec. 260.

The most comprehensive regulation of billboards occurs through zoning actions by municipal and county governments. In some cities billboards are a prohibited use. However, the vast majority of zoning ordinances in the United States include sign codes which closely regulate billboards, as well as political signage and on-premise business signage.<sup>3</sup> *See, e.g.,* Bakers-

<sup>3</sup> An "on-premise" sign advertises goods or services offered for sale on the premises where the sign is located.



field, Cal., Ordinance, ch. 17.60, sec. 91.5201; Los Angeles, Cal., Municipal Code sec. 91.5201; Code of the City of West Palm Beach, Fl., ch. 53.22.8. These very precise restrictions specify the zones in which billboards are permitted and the manner in which they can be sited and constructed. These local codes also prescribe height limitations and minimum standards regarding spacing and street set backs. Often these siting criteria will differ in severity from zone to zone, based upon the locality's perception of the intrinsic character of each zone.

This stringent regulatory structure has sharply limited the number of potential locations where billboards are a permitted use and has effectively ended billboard proliferation.<sup>4</sup> As result, the number of billboards in the United States has dropped dramatically. Between 1965 and 1989, the number of billboards along federal-aid primary and interstate highways alone was reduced from 1.1 million to 390,291. See Federal Highway Administration Annual Statistical Report, Outdoor Advertising Control Program (September 30, 1989).

This intense regulatory pressure has also had a decisive impact on competition within the outdoor advertising industry, as many companies found they were no longer able to maintain a sufficient number of billboards to provide market coverage to their

<sup>4</sup> The vast majority of potential sites where billboards are permitted are not viable billboard locations, principally because there is no room to accommodate the structure supporting a sign, visual clutter from buildings or on-premise signs blocks the view of the billboard and renders the site unusable or the site owner simply does not wish to have any collateral use conflicting with the principal land use.

clients. In turn, as billboards came to be regarded as an increasingly scarce resource, many billboard owners determined that they could secure a better return on their investment by selling their companies to a competitor, rather than continuing in business. In 1965, there were 7,400 outdoor advertising companies in the United States. By 1989, there were fewer than 350 companies remaining. The toll of regulation is strikingly evident in some geographic markets where three or more outdoor advertising companies may have existed twenty years ago and only one or two are now in operation.

## **II. The Potential of the Vague Standards Adopted By The Fourth Circuit To Chill Lawful Activity By Outdoor Advertising Companies and Others In Petitioning The Government**

### **A. The Deficiencies of the Fourth Circuit Tests are Readily Apparent When Viewed In Terms Of The Impact On Outdoor Advertising Companies**

The decision by the Fourth Circuit below found that there was sufficient evidence to support a jury finding that the City of Columbia, South Carolina had engaged in a "conspiracy" with Columbia Outdoor Advertising, Inc. ("COA") to violate Sections 1 and 2 of the Sherman Act, 15 U.S.C. secs. 1 & 2 (1890). The Fourth Circuit also found that the evidence supported a finding that the actions of COA in petitioning the government were a "sham," stripped of immunity under the *Noerr/Pennington* and *Parker v. Brown* doctrines.

The OAAA does not take a position on the merits of the instant case. Rather, the OAAA wishes to focus this Court's attention on the OAAA's belief that the standards of illegality adopted by the majority opinion



of the Court of Appeals are so vague and imprecise as to make it impossible for outdoor advertising companies and other parties with interests in land use regulation to ascertain when petitioning the government sheds its First Amendment protections and becomes a violation of the Sherman Act. The OAAA urges this Court to adopt a clear standard that establishes that acts of petitioning and negotiating with the government which are not otherwise illegal, corrupt or coercive are protected from antitrust attack by the *Noerr/Pennington* doctrine.

In his dissent, Judge Wilkinson states that there was no evidence that COA employees threatened or intimidated anyone or used coercive tactics, or that there was any deception or misrepresentation to secure passage of the billboard ordinances, or that there was any illegal conduct such as bribery, coercion or kickbacks, or that the Mayor or any member of the City Council stood to make any personal gain by passing billboard ordinances, or that there was any selfish or corrupt motive. *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d at 1146 (Wilkinson, J., dissenting). In addition, Judge Wilkinson found that the evidence did not support a conclusion that the actions of COA had sunk to the level of a "sham." *Id.* at 1146-48.

Judge Wilkinson suggested that the Fourth Circuit decision would,

give those who lose political battles a ticket to explore the subjective motivations of political decision-makers by filing federal anti-trust suits in which it is alleged that private meetings took place, that a personal friend-

ship between the officials and the plaintiff's competition existed, and that an anti-competitive regulation was enacted.

*Id.* at 1149.

Judge Wilkinson's concerns are well placed. Moreover, the OAAA believes that the Fourth Circuit majority's "conspiracy" and "sham" tests are stated so broadly that a potential new entrant or other third-party who was not even in existence at the time of a particular enactment might attempt to mount a Sherman Act challenge years after its passage. The risks and uncertainties inherent in the Fourth Circuit's "conspiracy" and "sham" standards are such that they will have a chilling effect on what until now have been governmental relations activities considered protected by the First Amendment.

#### **B. The Fourth Circuit's Decision Undercuts the Process of Legislative Compromise and Negotiation**

Despite the sharply limited number of billboards nationwide and the existence of a comprehensive regulatory structure, outdoor advertising companies are still assaulted by proposals that would seriously compromise or completely undercut their ability to maintain sufficient signs to continue their competitive operations. Some regulatory proposals go further and simply attempt to force outdoor advertising companies to remove their otherwise lawful billboards within a specified time period without any payment of just compensation whatsoever. *See, e.g., Raleigh, N.C., City Code secs. 10-2065 & 10-2066.*

As a result, outdoor advertising companies have an intense interest in the political process and are active in petitioning the government on all levels. Most out-

door advertising companies closely monitor political and legislative matters and maintain an active liaison with the city and county councils, mayors and the state legislative and executive branches simply as a matter of self-preservation.

The Fourth Circuit opinion is stated in such expansive terms that it casts a serious pall over actions aimed at procuring favorable government action which heretofore have been considered protected by the First Amendment. Often successful government relations activity in an area like billboard control may result in some compromise that nonetheless entails some further restrictions. It is not unusual for such a measure to include an increase in the required minimum spacing between signs. Such an increase in minimum sign spacing has the tendency to foreclose potential new entrants. This apparently occurred in the instant case. Even if there was no direct intent to exclude a potential competitor, the addition of any new restrictions would in some sense solidify the relative competitive position of the surviving companies. Given this context, the Fourth Circuit's vague "conspiracy" and "sham" tests place outdoor advertising companies and other regulated industries in limbo, without a clear sense of when otherwise lawful efforts to petition government become "abusive," short of some overt illegality such as bribery.

**C. The Fourth Circuit's "Conspiracy" and "Sham" Standards Will Have a Particularly Severe Impact On the Ability of Private Parties and Government to Compromise Disputes**

The Fourth Circuit decision creates a difficult choice for any company faced with a new regulatory initiative. Does a company facing proposed regulation en-

gage in a dialogue with government in order to shape the proposal to protect its interests and risk later antitrust attack or does the company remain passive and risk that the final government action will damage its interests in a way that might have been prevented? The seriousness of this dilemma is evident when it is considered in the context of the threat the Fourth Circuit's decision poses to those outdoor advertising companies that have succeeded in developing a basis for compromise with localities with respect to the control of outdoor advertising.

In the past, many disputes over billboard regulation quickly degenerated into protracted litigation over the validity of a measure which restricted or prohibited billboards within a jurisdiction. Indeed, many of these cases have burdened the courts and a considerable number have been the subject of petitions for certiorari or appeals to this Court. *See, e.g., Metro-media, Inc. v. San Diego, supra; Major Media of the Southeast, Inc. v. City of Raleigh*, 621 F. Supp. 1446 (E.D.N.C. 1985), *aff'd*, 792 F.2d 1269, (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987).

However, in recent years, a perceptible change has occurred in the way many of these disputes are being resolved. Increasingly, through constructive and non-adversarial government relations efforts, outdoor advertising companies are finding a willingness on the part of local and state governments to devise meaningful long range solutions through negotiation and compromise. As a result, a broad spectrum of localities and states have enacted billboard legislation that incorporates such compromise provisions negotiated between these parties. *See, e.g., Cincinnati, Ohio, Municipal Code, ch. 855; Buffalo, N.Y., Ordinance, ch.*



LXX, sec. 17(h). Indeed, some of these measures are actually embodied in formal agreements between the parties and are entered as consent decrees to settle litigation. See, e.g., *Ackerley Communications v. City of Seattle*, No. 857010 (King County [Washington] Superior Court, November 30, 1980); *Patrick Media Group, Inc. v. City of Lakewood, Ohio*, No. 88-0309 (E.D. Ohio, Feb. 9, 1988); *Heritage Creative Outdoor Services, Inc. v. Mayor of New Castle*, No. 87-166 (D. Del., March 16, 1988); *Reagan Outdoor Advertising v. Montgomery County*, No. 48285 (Montgomery County [Maryland] Circuit Court, April 11, 1990).

There is no single set of circumstances in which these measures arise. They may be the product of discussions with all competing outdoor advertising companies within a particular jurisdiction acting jointly, they may reflect the varying and possibly inconsistent positions of several companies in the market or they may arise in a market where only one outdoor company is in operation. The substance of these compromise measures also varies considerably. Some simply establish more rigorous spacing requirements or delineate certain particularly sensitive areas in otherwise permissible zones where billboards are to be prohibited. Other measures establish a specific numerical limit on the number of billboards that can be maintained in a jurisdiction or provide a company with a vested right in its remaining permits as an incentive to remove lawful nonconforming signs to conforming locations.

Inevitably, compromise agreements of this character in the land use area may have some arguable impact on present or potential competition. Given these circumstances, the Fourth Circuit decision in

the instant case casts serious doubt over the ability of localities and outdoor advertising companies to continue on this very productive course which, until now, seemed to be precisely the type of activity that the Court sought to engender through the *Noerr/Pennington* and *Parker v. Brown* doctrines.

In order to achieve any compromise in a legislative context, parties to a dispute must work closely together and engage in a candid exchange. The essence of the legislative process is to find a basis for compromise which advances the commercial purposes of the outdoor advertising company as well as the regulatory interest of the governmental entity. It is now unclear how to participate in such a process without inadvertently creating exposure to subsequent anti-trust attack, perhaps years after the event.

Under the Fourth Circuit's "sham" and "conspiracy" formulations it is simply not possible for a private party or governmental agency to know when effective and lawful government relations activity forfeits its First Amendment protections and metastasizes into an economic abuse which violates the antitrust laws, even where some specific overt illegal act is absent. Virtually every legislative compromise has elements of a "conspiracy" to create a competitive advantage that the Fourth Circuit found so compelling and is vulnerable to a claim that it is a "sham" or "abusive."

#### CONCLUSION

The decision of the Fourth Circuit has created a great deal of uncertainty as to when otherwise lawful activity related to petitioning government sheds its First Amendment protections under the *Noerr/Pen-*



*nington* and *Parker v. Brown* doctrines and when such otherwise lawful conduct becomes so abusive that it violates the Sherman Act. This uncertainty is particularly damaging to members of the outdoor advertising industry due to the pervasive regulation of the industry at the local, state and federal level. The Fourth Circuit's "sham" and "conspiracy" standards will undermine the ability of outdoor advertising companies to negotiate settlements of disputes with government agencies because of the risk that a disappointed actual or potential competitor will use successful negotiations as a basis for bringing an antitrust suit.

The Outdoor Advertising Association of America, Inc. respectfully urges the Court to articulate clear standards establishing when activity related to petitioning the government has immunity under the *Noerr/Pennington* doctrine. OAAA also urges the Court to articulate those standards so that acts of petitioning the government and negotiating with the government which are not otherwise illegal, corrupt or coercive will be protected from antitrust attack. To do otherwise will be to require companies to petition or persuade government at the risk that successful persuasion will subject them to substantial antitrust litigation and possible antitrust liability. Such a result would be inconsistent with the First Amendment right to petition the government and would discourage companies from attempting to reach compromises with government on issues of public importance. Thus, OAAA urges this Court to reaffirm the principal that petitioning the government, even if based solely on an anticompetitive motive, is not a violation of the federal antitrust laws, unless there

has been illegal, corrupt or coercive conduct. *Noerr*, 365 U.S. at 189.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

CITY OF COLUMBIA and COLUMBIA  
OUTDOOR ADVERTISING, INC.,  
*Petitioners,*

v.

OMNI OUTDOOR ADVERTISING, INC.,  
*Respondent.*

On Writ of Certiorari  
to the United States Court of Appeals  
for the Fourth Circuit

BRIEF OF THE  
NATIONAL LEAGUE OF CITIES,  
NATIONAL CONFERENCE OF STATE LEGISLATURES,  
U.S. CONFERENCE OF MAYORS,  
NATIONAL ASSOCIATION OF COUNTIES,  
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,  
AND COUNCIL OF STATE GOVERNMENTS  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Whether there is a "co-conspirator" exception to state action immunity under *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), based on the subjective motivations of local government officials.
2. Whether allegations of a sham or a conspiracy may defeat a private party's immunity from antitrust liability when it simply engaged in lawful methods of lobbying for municipal legislation.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

\_\_\_\_\_  
 No. 89-1671  
 \_\_\_\_\_

CITY OF COLUMBIA and COLUMBIA  
 OUTDOOR ADVERTISING, INC.,  
*Petitioners,*

v.

OMNI OUTDOOR ADVERTISING, INC.,  
*Respondent.*

\_\_\_\_\_  
 On Writ of Certiorari  
 to the United States Court of Appeals  
 for the Fourth Circuit  
 \_\_\_\_\_

BRIEF OF THE  
 NATIONAL LEAGUE OF CITIES,  
 NATIONAL CONFERENCE OF STATE LEGISLATURES,  
 U.S. CONFERENCE OF MAYORS,  
 NATIONAL ASSOCIATION OF COUNTIES,  
 INTERNATIONAL CITY MANAGEMENT ASSOCIATION,  
 AND COUNCIL OF STATE GOVERNMENTS  
 AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

\_\_\_\_\_  
**INTEREST OF THE *AMICI CURIAE***

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling



interest in the issues presented here: whether exceptions should be created to the state action and *Noerr-Pennington* doctrines that respectively shield from antitrust liability state and local governments and persons who petition those governments for legislative action.

In this case, the court of appeals fashioned exceptions to these doctrines that permit antitrust actions to proceed when municipal officials are alleged to have conspired with private parties to enact anticompetitive legislation that benefits those parties. This holding has profound consequences for local governments. It will permit losers in the legislative arena to assert antitrust claims in virtually every case where competing private interests sought—or supported—ordinances that have some anticompetitive effect. It will make suspect virtually all lobbying, and may call into question all attempts by private parties to inform local government decisionmaking. And it accordingly may discourage the sort of communication between legislators and affected citizens that is essential for effective government. For these reasons, *amici* submit this brief to assist the Court in its resolution of this case.<sup>1</sup>

## STATEMENT

*Amici* adopt petitioners' statement of the case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Congress and this Court have long recognized the interdependence between the political liberty enshrined in our Constitution and the economic liberty mandated by federal antitrust laws. Cognizant of this interdependence, the Court has developed immunity doctrines to ensure the coexistence of federal antitrust laws with two notable fixtures on our democratic landscape. The state

<sup>1</sup> The parties' letters of consent pursuant to Rule 37 of the Rules of this Court have been filed with the Clerk of the Court.

action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), preserves the right of States to regulate their own economies. The *Noerr-Pennington* doctrine (*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)) ensures that States will have the information necessary to exercise this function by protecting constituents' rights to petition for such regulations, regardless of their motives.

The court below purported to be sensitive to the interdependence between our political and economic liberties, claiming only to draw a narrow exception to the state action immunity doctrine for cases in which the municipality may be labelled a "co-conspirator." But such a narrow exception would swallow the rule. The vagaries of a conspiracy notion in the legislative context would render it impossible for federal courts to draw the necessary line between legitimate lobbying and conspiratorial conduct. Losing lobbyists always may be expected to challenge economic regulations on antitrust grounds. The result would be an enormous volume of litigation that, by dissecting the motives of local governments and their constituents, would weaken our federalist structure, stifle free speech, and limit the ability of the people to petition their governments.

Here, it is conceded that the City satisfies the requirements for immunity under the state action doctrine; its conduct therefore must be treated as that of the State. In such circumstances, respondent cannot prevail simply by arguing that the City had an anticompetitive motive. To the contrary, the very purpose of the state action doctrine is to *preserve* anticompetitive state conduct. Indeed, the Court has made clear that, while private anticompetitive activity is inherently suspect, politically accountable governmental bodies are presumed to act in the public interest. And in the absence of conduct on the part of government officials that the State has placed beyond the

pale, such as bribery or other corruption—conduct that is not present in this case—that presumption of regularity should not be set aside.

Similarly, there is no reason here to apply a “sham” or conspiracy exception to the *Noerr-Pennington* doctrine. The lobbying here was not a sham; to the contrary, respondent’s complaint is that it was too effective. And again, absent independent illegality on the part of the private defendant (in the form of bribery or similar conduct), it is impossible to see why the First Amendment principles that underlie *Noerr-Pennington* immunity are obviated by a lobbyist’s success at persuasion.

#### ARGUMENT

##### I. STATE ACTION IMMUNITY PROTECTS THE CITY OF COLUMBIA’S ORDINANCES FROM INJUNCTION UNDER THE SHERMAN ACT.

In its development of the state action immunity doctrine under *Parker v. Brown*, 317 U.S. 341 (1943), this Court reconciled two congressional purposes. While Congress intended that the Sherman Act, 15 U.S.C. §§ 1-7, not nullify state regulation, it also sought to preclude States from immunizing the private, anticompetitive conduct prohibited by the Act. Consistent with these intentions and sensitive to federalism concerns, this Court has enunciated standards to immunize true state regulation while punishing private violations of the Act. In cases involving municipal regulation, this Court has required that the actions of local government be taken pursuant to a clearly articulated state policy to displace competition. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985).

Respondent’s arguments would upset this carefully struck balance. Although respondent claims only to seek a narrow exception for cases in which the municipality may be labelled a “co-conspirator,” such an exception is precluded by the state action doctrine itself. States,

under *Parker*, simply are not within the substantive reach of antitrust laws. Local governments, as the States’ agents, share this immunity, so long as they satisfy the *Town of Hallie* standard.

In place of this straightforward application of *Parker* and *Town of Hallie*, the court of appeals posits an extraordinary—and extraordinarily peculiar—reading of the antitrust laws. *Parker* and its progeny make clear that Congress, in enacting those laws, chose not to subject state conduct to antitrust scrutiny. This is an immunity that turns on the identity of the actor, and is premised on the conclusion that Congress did not want to displace legitimate state activity. The court of appeals acknowledged all this. It appeared to believe, however, that Congress, having exempted States (and duly authorized municipalities) from the reach of the antitrust laws, then implicitly chose to subject them to liability if their facially valid legislative acts were “improperly” motivated. This exception is wholly unrelated to the premises on which Congress grounded the state action doctrine; it also would impose a federal oversight of the state legislative process that is virtually unique. Not surprisingly, there is no evidence whatsoever that Congress actually intended to enact such a regime.

##### A. *Parker* And *Town of Hallie* Protect The City’s Ordinances Because They Are Legislatively Authorized.

In *Parker*, this Court held that the Sherman Act does not reach restraints of trade “imposed . . . as an act of government” by a sovereign State. 317 U.S. at 352. *Parker* rests on an understanding of congressional intent that is informed by federalism principles. In enacting the Sherman Act, Congress did not intend to nullify the right of the people, speaking through their elected state and local representatives, to regulate their economies. The Court found “nothing in the language of the Sherman Act or in its history which suggests that its



purpose was to restrain a state or its officers or agents from activities directed by its legislature" (*id.* at 350-351), adding that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351. Thus, "under the Court's rationale in *Parker*, when a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws." *Hoover v. Ronwin*, 466 U.S. 558, 567-568 (1984).<sup>2</sup>

Because state action immunity follows from the congressional intent to preserve the regulatory role of States, the Court has required that "to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'" *Town of Hallie*, 471 U.S. at 38-39, citing *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978). But the Court has interpreted this requirement in a manner that is sensitive to the federalism principles that Congress embraced in the anti-

<sup>2</sup> The Court's unwillingness to apply the Sherman Act to state regulation is consistent with its other preemption case law. Grounded in the Supremacy Clause, preemption treads on the very sensitive area of federal-state relations, and thus this Court has been "reluctant to infer preemption." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978). Instead, the presumption is that preemption is not to be found absent "the clear and manifest purpose of Congress" that the federal act should supersede the police powers of the States. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Sherman Act contains no such "clear and manifest" intent to preempt—in fact this Court has repeatedly "found in the Sherman Act no purpose to nullify state powers." *California Retail Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980), citing *Parker*, 317 U.S. at 352 (emphasis added).

trust laws. A local government "need not 'be able to point to a specific, detailed legislative authorization'" for its challenged conduct. *Town of Hallie*, 471 U.S. at 39, citing *Lafayette*, 435 U.S. at 415 (opinion of Brennan, J.). Instead, economic policy will be deemed to be "clearly articulated" when a state legislature manifests an intention to impose economic regulation upon an identified area of business behavior. *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985).<sup>3</sup>

The Fourth Circuit held (Pet. App. 7a-9a) that South Carolina laws authorizing local zoning regulation sufficiently authorized the City's billboard ordinances under *Town of Hallie*. See Pet. App. 7a n.2, quoting S.C. Code Ann. §§ 5-23-10, 5-23-20; *id.* § 6-7-10.<sup>4</sup> And the restriction of competition is a foreseeable result of empowering the City with this zoning authority. See *Town of Hallie*, 471 U.S. at 42; *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886 (9th Cir.), cert. denied, 109 S.Ct. 489 (1988). That should have been the end of the court of appeals' inquiry.

<sup>3</sup> For local government immunity, active supervision by the State is not required. *Town of Hallie*, 471 U.S. at 46-47. Nor must the State intend that the local regulation have an anticompetitive effect. *Id.* at 43. Finally, the local regulation need not be enacted pursuant to state compulsion. *Id.* at 45-46.

<sup>4</sup> It bears repeating that "zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.'" *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 80 (1976) (Powell, J., concurring) (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)). In pursuit of these goals, local governments around the country have enacted ordinances to limit billboards or other business activities, pursuant to general authorizations similar to South Carolina's. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (plurality opinion). To find that the ordinances here do not merit *Town of Hallie* protection would imperil countless other zoning ordinances.



**B. Respondent's Conspiracy Allegations Do Not Defeat The City's State Action Immunity.**

1. Under this Court's analysis in *Town of Hallie*, state action immunity protects the City of Columbia's ordinances from injunction under the Sherman Act because they were enacted pursuant to a clearly articulated state policy to displace competition. Nothing more need be shown. The court of appeals nevertheless concluded that it should enjoin the City from enforcing those ordinances because the City was a "co-conspirator" in a scheme to restrain trade. But *Town of Hallie*'s objective, process-oriented test precludes a subjective analysis that effectively would extend the antitrust laws to reach the conduct of defendants that otherwise is not covered by the Sherman Act.

Indeed, this Court explicitly rejected such a co-conspirator exception to state action immunity in *Hoover v. Ronwin*. The Court there said that *Parker*

unmistakably hold[s] that, where the action complained of . . . was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action. . . . The reasoning adopted by the dissent would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the *Parker v. Brown* doctrine. . . . A party dissatisfied with the new law could circumvent the state-action doctrine by alleging . . . an undisclosed collective desire to restrain trade. . . . The plaintiff certainly would survive a motion to dismiss—or even summary judgment—despite the fact that the suit falls squarely within the class of cases found exempt from Sherman Act liability in *Parker*.

*Hoover*, 466 U.S. at 579-580. A co-conspirator exception would entail the same emasculation of *Town of Hallie* that the Court perceived in *Hoover*.

The court of appeals' rejection of this conclusion is premised on a misunderstanding of the state action doctrine. The court's holding was grounded on the assumption that, if the doctrine excludes a conspiracy exception, "the Supreme Court in post-*Parker* decisions would have given municipalities the same blanket protection it had awarded states in *Parker*." Pet. App. 12a. But as this Court has several times explained, "[m]unicipalities . . . are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Town of Hallie*, 471 U.S. at 38. In contrast, when municipalities act pursuant to state authorization, they do so as state agents; by validating state-authorized anticompetitive acts taken by local governments, the state action doctrine "preserv[es] to the States their freedom . . . to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." *Id.* at 39, quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 415-416 (opinion of Brennan, J.).

The Court accordingly has declined to give "municipalities the same blanket protection" accorded States (Pet. App. 12a), not to preserve a conspiracy exception, but simply because unauthorized municipal action is not the action of the State. When the *Town of Hallie* requirements are satisfied, however—as they concededly are in this case—"a municipality is an arm of the State." *Town of Hallie*, 471 U.S. at 45 (emphasis added). And granted satisfaction of those requirements, there is nothing in this Court's decisions that justifies the distinction upon which the court below premised its holding.

To the contrary, the court of appeals' analysis is inconsistent with the political theory—and the understanding of behavior—upon which Congress and this Court premised state action immunity. A private party, of course, "may be presumed to be acting primarily on his

or its own behalf." *Town of Hallie*, 471 U.S. at 45-46. As a consequence, "[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Patrick v. Burget*, 108 S.Ct. 1658, 1663 (1988), quoting *Town of Hallie*, 471 U.S. at 47. See also, e.g., *324 Liquor Corp. v. Duffy*, 107 S.Ct. 720, 725-726 (1987). Private anticompetitive conduct therefore is inherently suspect. But where a politically accountable governmental body is responsible for the restriction at issue, "[w]e may presume, absent a showing to the contrary, that the municipality acts in the public interest." *Town of Hallie*, 471 U.S. at 45 (footnote omitted).

In our economic system, private business enterprises are presumed to respond predominately, if not exclusively, to the profit motive. By contrast the concept of "profit" *per se* is alien to the purposes of a unit of government. Consequently, the clash of interests necessitating an antitrust law—the private desire to reap extra-normal profits versus the public interest in free competition—will not appear in its traditional form when the accused antitrust conspirator is a governmental entity.

*Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1571-1572 (5th Cir. 1984) (*en banc*), cert. denied, 474 U.S. 1053 (1986). If public officials misjudge the public interest, the public has an immediate remedy at the polls.

It is no answer to this to suggest, as did the court of appeals, that state or municipal action is not in the public interest when it relates "solely to forcing competitors from a particular market" or is otherwise anticompetitive. Pet. App. 12a; see *id.* at 9a. The very point of the state action doctrine, after all, is to save anticompetitive governmental action; by definition, the doctrine comes into play only when state (or authorized local) governmental activity otherwise would violate the Sherman Act.

See *Fisher v. Berkeley*, 475 U.S. 260, 265 (1986). The doctrine accordingly is premised on the understanding that States and authorized local governments may displace competition when that is thought to be in the public interest. This may mean that States favor one industry over another or, on occasion, one firm over another. But at least so long as the political process is not distorted by objectively illegal acts such as bribery—a possibility we discuss below—the theory of the state action doctrine precludes a challenge predicated solely on a statute's anticompetitive effect or purpose.

That this is so comes clear from the elements of congressional intent that underlie the *Parker* doctrine. This Court has repeatedly "found in the Sherman Act no purpose to nullify state powers." *Midcal*, 445 U.S. at 104, citing *Parker*, 317 U.S. at 352 (emphasis added). Respondent's co-conspirator doctrine would be an exception to this exception. Such convoluted statutory construction would make a mockery of *Parker*'s canon that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be inferred." *Parker*, 317 U.S. at 351 (emphasis added).

2. The wisdom of the *Parker* rule is evident. Every legislative decision produces winners and losers, and government could not function if the losers in the legislative process were permitted to use litigation to cure their grievances. In such a system, local governments would have to bear "the substantial 'discovery and litigation burdens' attendant particularly upon refuting a charge of improper motive." *Hoover*, 466 U.S. at 580-581 n.34.

This ongoing judicial supervision would have detrimental effects upon the autonomy of local government units and their authority to govern themselves. Even if the distraction of burdensome federal judicial review could be reconciled with federalism concerns, the intrusiveness could not. Inquiries into legislative motive "are



a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . What motivates one legislator . . . is not necessarily what motivates scores of others to enact [legislation], and the stakes are sufficiently high for us to eschew guesswork." *Id.* at 383-384. Indeed, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986), rejected a dissection of legislators' motives in the specific context of the enactment of a zoning ordinance that limited the locations of adult motion picture theaters. In light of the Court's vigilant role in guarding First Amendment rights, the decision to limit its inquiry in *Renton* is especially telling. Surely, if federal courts are prohibited from searching for legislative motives to restrain the marketplace of ideas, those courts must be equally limited in policing the economic marketplace, where their standard of review has been more deferential.<sup>5</sup>

In fact, respondent's co-conspirator exception might entail a complete abandonment of that historically deferential role. A conspiracy exception would force local governments to disprove allegations of improper motivation by demonstrating that they had enacted the challenged regulations for pro-competitive or public welfare reasons. The review of such motivations would return federal courts to a substantive review of economic

<sup>5</sup> The only exception to this Court's refusal to invalidate statutes on the basis of motive is the "very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose." *United States v. O'Brien*, 391 U.S. at 383 n.30 (bill of attainder). See *Edwards v. Aguillard*, 107 S.Ct. 2573, 2578-2583 (1987) (secular purpose); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264, 268 n.18 (1977) (race-based motivation).

regulation—a role that this Court rejected in *Parker*. It is a role, moreover, that the courts are ill-equipped to fill, for "[t]here is simply no way to tell if the state has 'looked' hard enough at the data." P. Areeda & D. Turner, *Antitrust Law* ¶ 213c, at 75 (1978).<sup>6</sup>

Finally, a co-conspirator exception would impermissibly inject federal courts into monitoring the relationship between a State and its local governments. Yet the Court implicitly rejected such an approach in *Town of Hallie*, viewing the requirement of active supervision that is imposed on private anticompetitive conduct as too intrusive to impose on municipalities. And the requirement rejected in *Town of Hallie* appears deferential when compared to the paternalism involved in a federal court's trying to discern whether a local government has acted for the State's public good. Such an approach, as the Court indicated in a similar context, "would interfere significantly with a State's ability to structure relations exclusively with its own citizens. . . . A healthy regard for federalism and good government renders us reluctant to risk these results." *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980).<sup>7</sup>

<sup>6</sup> A conspiracy exception to state action immunity would also present local elected officials with the difficult choice between facing federal antitrust liability if they respond to their constituents or being voted out of office if they do not.

<sup>7</sup> This Court has also refused to carve out a conspiracy exception for cases involving state delegation to private parties. In *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), the Court upheld a California regulation permitting established automobile dealers to delay substantially the establishment of competing franchises in their geographic markets, despite arguments that the regulation represented nothing more than the success of the car dealers in lobbying the state legislature for a special anti-competitive benefit. *Id.* at 115, 120 (Stevens, J., dissenting). This Court has instead recognized and addressed the lack of a direct political check in cases of delegation to private parties by requiring, in addition to a clearly articulated state policy, active state supervision of the private conduct. The rejection of a conspiracy excep-



3. Fortunately, a conspiracy exception to antitrust preemption is as unnecessary as it is dangerous. When "the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing agreement." *Town of Hallie*, 471 U.S. at 47. "[M]unicipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct." *Id.* at 45 n.9. Most States have sunshine laws or other mandatory disclosure laws such as freedom of information or financial disclosure acts that guard against municipal conspiracies. Local governments generally must comply with strict bidding and procurement requirements established under state law. Most important, public officials are ultimately accountable to the public through the electoral process. Such a position in the public eye should provide "some greater protection against antitrust abuses than exists for private parties." *Ibid.*<sup>8</sup>

tion even in cases involving delegation to private parties precludes recognizing such an exception in cases involving the conduct of local governments where a more deferential standard applies.

<sup>8</sup> In addition to these safeguards, federal law also deters and punishes abuses of the government process. Local governments are no strangers to litigation under 42 U.S.C. § 1983. In fact, many of the antitrust cases that have been brought against local governments include Section 1983 claims, resulting in even more convoluted litigation. See, e.g., *Golden State Transit Corp. v. City of Los Angeles*, 520 F. Supp. 191 (C.D. Cal. 1981), rev'd, 686 F.2d 758 (9th Cir. 1982), cert. denied, 459 U.S. 1105 (1983), on remand, 563 F. Supp. 169, aff'd, 726 F.2d 1430 (9th Cir. 1984), cert. denied, 471 U.S. 1003 (1985); *Lasalle National Bank v. Lake County*, 579 F. Supp. 8 (N.D. Ill. 1984). Federal funds may be recovered from local government grantees when the funds have been misspent. *Bell v. New Jersey*, 461 U.S. 773 (1983). The provisions of the federal bribery statute, 18 U.S.C. § 201, may also be applied to local government officials and their grantees. Finally, provisions of the Robinson-Patman Act, 15 U.S.C. §§ 13(a) and 13(f), have been applied to commercially motivated retail transactions by state and local governments. *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150 (1983).

Against the Court's holding in *Hoover* that rejected a conspiracy exception, respondent offered dicta from *Parker*, or more accurately, dicta misunderstood. This dicta did not carry the day in *Hoover* and should not do so here. Moreover, each phrase culled from *Parker* is followed by a citation to cases that either are inconsistent with a conspiracy exception or are easily distinguishable from this case because they struck down state delegations of regulatory power to financially interested private parties, not to local governments checked by the political process.

The first supposed basis for a conspiracy exception is *Parker's* dictum that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, *Northern Securities Co. v. United States*." *Parker*, 317 U.S. at 351. But in *Northern Securities*, 193 U.S. 197, 332, 334-347 (1904), the Court simply held that a decision to enjoin a combination of stockholders did not invade the reserved rights of the States that had created the corporations.

Second, the *Parker* Court noted that it faced "no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade, cf. *Union Pacific R. Co. v. United States*." *Parker*, 317 U.S. at 351-352. *Union Pacific*, however, involved an arrangement in which a private party took a leading and dominant part in administering the restraint of trade without anything approaching active supervision by any state or local government. See *Union Pacific R. Co. v. United States*, 313 U.S. 450, 467 (1941).

The final supposed basis (see Pet. App. 10a) for a co-conspirator exception is the Court's suggestion in *Parker* that "the state in adopting and enforcing the . . . program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish a monopoly

but, as a sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Parker*, 317 U.S. at 352, citing *Olsen v. Smith*, 195 U.S. 332, 345 (1904), and *Lowenstein v. Evans*, 69 F. 908, 910 (1895). Yet, *Olsen* and *Lowenstein* confirm *Parker*'s holding that the exercise of regulatory power by the State is, by definition, an exercise of sovereignty, and therefore cannot be a restraint of trade. The *Olsen* Court stated that, "if the State has the power to regulate, and in so doing to appoint and commission those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law." 195 U.S. at 345. In *Lowenstein*, the circuit court found that the "act of the legislature of South Carolina evidently does not create in nor give to any individuals the monopoly. . . . [B]y this act the state makes no contract, enters into no combination or conspiracy." 69 F. at 910 (emphasis added).

Subsequent case law that supposedly supports a conspiracy exception similarly involved the delegation of regulatory authority to financially interested private individuals. For example, in *Midcal* the Court stated that "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." 445 U.S. at 106. The statute at issue in *Midcal* authorized a private party—a wine producer—to compel a second private party—a wholesaler—to enter into an agreement fixing resale prices. It is precisely this element of private concerted action that is wholly lacking in this case.

We should add that this is not a case where an exception to state action immunity may be premised on

corruption or illegality on the part of government actors. It is not at all clear that such an exception is appropriate under the antitrust laws; while "[n]obody condones fraud, bribery, or misrepresentation in any form . . . other state and federal laws ensure that such conduct is punishable." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S.Ct. 1931, 1944 (1988) (White, J., dissenting). But in any event, conduct that does not run afoul of bribery or other laws necessarily is legitimate, and legislation that is a product of lobbying or similar activities that the State has deemed lawful cannot be distinguished from other state action on that ground.

Here, there was no corruption. The jury charge in this case did not tie liability to a finding of bribery or other independently illicit conduct. See Pet. App. 39a-40a (Wilkins, J., dissenting). And the record is, in any event, insufficient to support a finding of objectively corrupt acts. Respondent failed to prove that any of the City Council members acted with bad faith.<sup>9</sup> Instead, respondent relied either on its own subjective perceptions,<sup>10</sup> the existence of COA's wholly licit personal relationships

<sup>9</sup> "At no time did COA employees threaten anyone or use otherwise coercive tactics. No one engaged in deception or misrepresentation to secure passage of the billboard ordinances. There was no evidence of any illegal conduct such as bribery, coercion, violence, kickbacks, or the like. Neither the Mayor nor the City Council members stood to gain any personal financial advantage by passing the billboard ordinances nor was there any evidence of any other selfish or otherwise corrupt motive." Pet. App. 39a (Wilkins, J., dissenting).

<sup>10</sup> The subjective perceptions include respondent's claim that the Mayor and members of the City Council were less cordial to its representatives than to COA's and its emphasis on a COA official's puffing about his influence with the local government. Pet. App. 13a-17a; *id.* at 38a (Wilkins, J., dissenting). Rudeness and puffery are not touchstones of antitrust liability.



with City Council members,<sup>11</sup> or COA's use of other legitimate aspects of our political system.<sup>12</sup> These facts are not sufficient to strip defendants of antitrust immunity. If there ever is a need to stretch antitrust laws to reach overt, corrupt acts, this is surely not the case.

In short, state action immunity, as an expression of the substantive limits on the reach of the antitrust laws, can admit of no conspiracy exception. Even if it were not logically precluded, such an exception would severely threaten the principles of federalism that form the foundation for the doctrine. It is not a proper role for federal courts to decide whether an interested party, simply through its lobbying efforts, has exerted too much influence upon the enactment of legislation.

## II. THE NOERR-PENNINGTON DOCTRINE IMMUNIZES COA'S CONDUCT FROM ANTITRUST LIABILITY.

Under the *Noerr-Pennington* doctrine, a private party may not be held liable under antitrust laws for seeking to persuade government officials to take a particular action. In the court of appeals, respondent contended that COA was not entitled to *Noerr-Pennington* immunity because COA's activities allegedly fell within the "sham" exception or, alternatively, within a new "co-conspirator" exception to the *Noerr-Pennington* doctrine. The court of appeals agreed with respondent that COA's actions were a sham and therefore found it unnecessary to consider the validity or applicability of any co-conspirator exception.

Neither of these exceptions applies. The evidence that appeared to trouble the Fourth Circuit does not sup-

<sup>11</sup> Respondent repeatedly relied on the friendship between COA's owner and the Mayor. Pet. App. 38a-39a, 43a (Wilkins, J., dissenting). Friendship is also not a touchstone of antitrust liability.

<sup>12</sup> Respondent relied on lobbying efforts and campaign contributions made long before or after this case began. Pet. App. 38a-39a (Wilkins, J., dissenting).

port, indeed is not even pertinent to, application of the sham exception. Moreover, there is, and ought to be, no co-conspirator exception to the *Noerr-Pennington* doctrine. To subject lobbying activity to antitrust liability under the standard embraced by the court below would deprive state and local governments of a valuable and necessary source of information, and would entangle such public bodies in wasteful and distracting litigation.

### A. COA Lobbied For A Governmental, As Opposed To A Private, Action.

In *Noerr*, this Court held "that no violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135. To hold otherwise, this Court explained, "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act." *Id.* at 137. The Court declined to do this in *Noerr* because of the substantial First Amendment rights at issue: "That right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138.

The court below overlooked this fundamental consideration. Like the publicity campaign in *Noerr*, and unlike the situation in *Allied Tube*, 108 S.Ct. at 1939, the activity at issue here took place "in the open political arena, where partisanship is the hallmark of decision-making." *Id.* at 1940. "[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." *Id.* at 1936, citing *Noerr*, 365 U.S. at 136.<sup>13</sup> Thus, since the "restraint of trade," if any, resulted from the City of

<sup>13</sup> The Court in *Allied Tube* repeatedly emphasized the importance of the "private" context. See, e.g., 108 S.Ct. at 1937 ("The rele-



Columbia's ordinances, *Noerr-Pennington* immunizes COA from liability for any damages resulting from that ordinance.<sup>14</sup>

#### B. COA's Lobbying Activities Were No Sham.

In holding COA liable under the Sherman Act, the Fourth Circuit determined that COA's actions fell within the sham exception to the *Noerr-Pennington* doctrine. The Fourth Circuit relied on certain evidence allegedly establishing the anticompetitive goals of COA's lobbying activities and the purported denial to respondent of meaningful access to the City's decisionmaking process. In so doing, the court below stretched the sham exception well beyond its recognized limits.

Whatever may be said of COA's actions, they plainly were not a sham. In the typical sham case, a private party pursues baseless claims with no realistic expectation of winning a favorable governmental response but in the hope that the claims will provide a competitive benefit. See P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 203.1a, at 13-14 (Supp. 1988). Fairly considered, respondent's essential claim is precisely the opposite—not that COA's lobbying was a pretext, but that the lobbying was, in fact, too successful.

This Court recently considered the proper reach of the sham exception in *Allied Tube*. There, the Court squarely rejected the notion that the sham exception ap-

vant context is thus the standard-setting process of a private association."); *ibid.* ("[W]hatever *de facto* authority the Association enjoys, no official authority has been conferred on it by any government.").

<sup>14</sup> Respondent's apparent effort in this Court (see Br. in Opp. at 8) to tie its claim in part to actions of COA unrelated to lobbying for the ordinances is contrary to the court of appeals' understanding of respondent's case. See Pet. App. 33a.

plies to "the activity of a defendant 'who genuinely seeks to achieve his governmental result, but does so through improper means.'" 108 S.Ct. at 1941 n.10 (citation omitted). "Such a use of the word 'sham' distorts its meaning and bears little relation to the sham exception *Noerr* described to cover activity that was not genuinely intended to influence governmental action." *Allied Tube*, 108 S.Ct. at 1941 n.10. As in *Allied Tube*, "[t]he effort to influence governmental action in this case certainly cannot be characterized as a sham given the actual adoption of the [legislation]." *Id.* at 1938. *Allied Tube* teaches that the sham exception applies only when lobbying is intended not to influence the government, but to injure a competitor directly.

Indeed, COA's anticompetitive motivation is utterly irrelevant to *Noerr-Pennington* immunity. The *Noerr* Court unanimously held that lobbying is beyond the reach of the Sherman Act, even where its "sole purpose" is to destroy competitors. 365 U.S. at 138. "It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." *Id.* at 139. The Court relied not only on the First Amendment and congressional intent, but also on state and local governments' need for such information: people with "a hope of personal advantage . . . provide much of the information upon which governments must act." *Ibid.*

Respondent also claims that COA's efforts here were not genuine, or were aimed at delay, simply because a state court subsequently invalidated the ordinance that COA favored. But the right to petition "would be considerably chilled by a rule which would require an advocate to predict whether the desired legislation would withstand constitutional challenge." *Subscription Television, Inc. v. Southern California Theatre Owners Ass'n*, 576 F.2d 230, 233 (9th Cir. 1978). In fact, a lower fed-

eral court had upheld a moratorium similar to that of the City of Columbia, supporting the genuineness of the COA's lobbying for an appeal. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 45-46, 47 n.10 (1982).

The Fourth Circuit supported its extension of the sham exception by referring to a line of cases involving private restraints only incidentally related to governmental action. These cases stand solely for the proposition that such agreements in restraint of trade do not become protected simply because they may eventually be reviewed or ratified by a government agency. See *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768, 778-779 (1990) (horizontal price-fixing arrangements not immunized merely because they are linked to efforts to induce public officials to act in certain way); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-463 (1945) (horizontal price agreements not protected merely because competitors wished to propose that price as appropriate level for governmental ratemaking). Thus, COA's genuine lobbying for governmental action does not fall within *Noerr's* sham exception. To hold otherwise would render "sham no more than a label courts could apply to activity they deem unworthy of antitrust immunity." *Allied Tube*, 108 S.Ct. at 1941 n.10.

#### C. Respondent's Conspiracy Allegations Do Not Defeat COA's *Noerr-Pennington* Immunity.

Although the court below did not address respondent's argument that a "conspiracy" exception exists to *Noerr-Pennington* immunity, its expansion of the sham exception, and emphasis on the alleged conspiracy between COA and City officials, effectively created the exception sought by respondent. As with a conspiracy exception to *Parker* immunity, a conspiracy exception to the *Noerr-Pennington* doctrine would be inappropriate, unnecessary, and dangerous. This Court has rejected attempts to

transform the Sherman Act into a political code of conduct.

Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity. . . . The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involved conduct that can be termed unethical.

*Noerr*, 365 U.S. at 140-141.<sup>18</sup> As the Seventh Circuit has observed, "[n]othing in the *Noerr* opinion or any other case of which we are aware suggests any reason for believing that Congress, not having intended the Sherman Act to apply to combined efforts to induce legislative action, did intend the Act to apply if a member of the legislative body agreed to support those efforts." *Metro Cable Co. v. CATV of Rockford*, 516 F.2d 220, 230 (7th Cir. 1975).

*Metro Cable* involved allegations strikingly similar to respondent's charges. The losing cable company asserted that two members of the public persuaded the defendant Mayor and Alderman to support the CATV application "in exchange" for campaign contributions. The Seventh Circuit found such allegations insufficient to abrogate *Noerr-Pennington* immunity: "A holding that participation by members of the legislative body to the extent al-

<sup>18</sup> The *Noerr* Court unanimously held that lobbying is beyond the reach of the Sherman Act, even when defendants deceptively promoted their own lobbying efforts as those of ostensibly neutral third parties. 365 U.S. at 141.



leged here . . . would . . . be tantamount to outlawing all such campaigns." 516 F.2d at 230. In short, a conspiracy exception would "in practice abrogate the *Noerr* doctrine. It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became . . . 'co-conspirators.'" *Ibid.*

Respondent's proposed conspiracy exception also, once again, ignores the irrelevance of anticompetitive motivation to *Noerr-Pennington* protection. The right to endeavor to influence governmental action includes the right to do so out of self-interested, and even blatantly anticompetitive, motives. This Court has never insisted that political rights be exercised "without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare." *Brown v. Hartlage*, 456 U.S. 45, 56 (1982); *id.* at 56 n.7 (citing *The Federalist* No. 10 (J. Madison)).

This Court has not used Sherman Act liability as a political litmus test because no workable boundary exists between a "conspiracy" and legitimate lobbying. And in the First Amendment context, vague lines chill speech. Although the City of Columbia may have been able to enact its billboard ordinances without the assistance of COA, the prospect of treble damages would surely silence future constituents with essential information.

State and local governments have an acute interest in preserving the *Noerr-Pennington* doctrine from abrogation. The protection of lobbying by private citizens is necessary to preserve the flow of information to state and local government officials and hence to protect their ability to act. To deny such immunity would eliminate from the legislative process significant data currently provided by commercially motivated private parties, thus placing a

substantial burden upon state and local legislators to obtain the information necessary to adopt regulations. Indeed, "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Noerr*, 365 U.S. at 137.

For purposes of this case, we need not suggest that all lobbying is protected. As with *Parker* immunity, it would be possible to deny protection to "lobbying" activities that involve otherwise illegal acts. See *Allied Tube*, 108 S.Ct. at 1939 (indicating that misrepresentation to a court or misrepresentation under oath at a legislative committee hearing would not necessarily be entitled to antitrust immunity); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (no immunity if private party engages in illegal bribery to achieve its ends). The denial of *Noerr* immunity in such circumstances would entail less danger than a conspiracy exception because the lines would be drawn not by the Sherman Act, but by laws attuned to First Amendment concerns.

Yet once again, the facts in this case would not fall within such an exception. Neither personal relationships with elected officials nor lawful campaign contributions can conceivably be viewed as corruption of the normal legislative process that would justify application of the antitrust laws to a local political struggle. Similarly, absent a showing of illegality, COA's occasional provision of free or inexpensive billboard space to public officials cannot be the basis for abrogating *Noerr-Pennington* immunity. And if the City Council did indeed decide to favor COA's position before hearing respondent's presentation, the remedy is at the polls, not in the award of treble damages.

There may be much that is distasteful about the reality of interest-group politics, and much reason to hope that individuals will transcend their private interests and



seek instead the public good. But this Court has never sanctioned the restriction of political speech as a method of ensuring that they do so. Certainly, if there is to be regulation of the lobbying process, it ought not to be through imposition of treble-damage Sherman Act liability—especially when that liability is imposed on the basis of a jury's sense of appropriate etiquette in the political arena as measured by a hazy conspiracy standard.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

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**No. 89-1671**

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CITY OF COLUMBIA  
AND COLUMBIA OUTDOOR ADVERTISING, INC.,  
*Petitioners,*  
v.  
OMNI OUTDOOR ADVERTISING, INC.,  
*Respondent.*

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**BRIEF OF ASSOCIATED BUILDERS  
AND CONTRACTORS, INC. AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENT**

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**STATEMENT OF INTEREST AND  
SUMMARY OF ARGUMENT**

This case involves the scope of two judicially created exemptions to antitrust liability. The jury found that local government officials had abandoned their public duties and joined a private conspiracy to restrain trade in violation of the antitrust laws. The jury also found that an incumbent firm had lobbied for and obtained passage of an ordinance that was known to be unconstitutional, and did so as a means of delaying entry into the marketplace by a competing



firm. The facts are not disputed.<sup>1</sup> The sole question is whether such conduct should be immune from antitrust challenge under the *Parker* or *Noerr-Pennington* doctrines.

Associated Builders and Contractors, Inc. ("ABC") is a national trade association of over 18,000 merit shop construction contractors (contractors that use both union and non-union labor). Since its founding in 1950, ABC and its members have sought to provide high quality, low cost and timely construction work, benefiting businesses, consumers and taxpayers. The objectives of ABC and its members are often threatened or thwarted by anticompetitive activity at the local level which improperly precludes the acceptance of more favorable bids submitted by merit shop contractors on construction projects. Such activity includes alliances between some local government officials and pro-union interest groups that reflect purely private undertakings not related to the protection of the public interest. It also includes what ABC and its members consider to be sham activity before various permit authorities and courts. In many cases ABC's members are not from the locality which is imposing the restraint, and thus they have no remedy through the political process. The Court's interpretation of the *Parker* and *Noerr-Pennington* exemptions to the antitrust laws in this case will have a direct effect on the ability of ABC and its members

<sup>1</sup> While petitioners spend several pages in their opening brief discussing their view of the facts (see Brief for Petitioners at 2-6), this case is not an appeal from the jury's verdict based upon insufficiency of the evidence. Thus, the facts, as found by the jury, are controlling here.

to defend themselves against such efforts to restrain competition in the construction business.

ABC, as an *amicus* filing a brief in support of respondent,<sup>2</sup> asks the Court to affirm the following two principles:

(1) The limited immunity from antitrust liability created for municipal governments under the *Parker* doctrine, as extended in *Town of Hallie*, does not apply to conduct by local officials that is undertaken pursuant to a private agreement to restrain trade rather than an intent to serve the public interest.

(2) The "sham" exception to the limited immunity from antitrust liability created for persons who petition the government under the *Noerr-Pennington* doctrine applies to conduct that would not have been undertaken but for its ability to restrain trade without regard to its success in obtaining relief from the government, even where some success before the governmental body is achieved.

As this Court has noted, the antitrust laws, and the economic system they protect, are an important part of the American system. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958) (antitrust laws create an economic environment "conducive to the preservation of our democratic political and social institutions"). This Court has often spoken of the antitrust laws in terms generally saved for a discussion of the Constitution itself. *Appala-*

<sup>2</sup> Pursuant to Rule 37.3 of the Rules of this Court, this brief is filed with the consent of petitioners and respondent. Letters of consent from all parties are being filed concurrently herewith.

chian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933) (Sherman Act has "a generality and adaptability comparable to that found to be desirable in constitutional provisions"); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.")

The rules articulated in this brief are needed to preserve the application of the antitrust laws in two categories of cases where conduct which clearly restrains trade might mistakenly be protected because it is similar to legitimate conduct that is properly immune from antitrust challenge.

The first category of cases includes those where local officials have abandoned their obligation to serve the public interest and have instead joined a private agreement to restrain trade. For example, in this case the jury found that local officials had acted purely with the intent of protecting the owners of an incumbent local firm against competition from a new entrant without regard to the public interest. In such cases the local government has rid itself of whatever protection it might otherwise have claimed as a branch of government, and is entitled to no better treatment under the antitrust laws than any other private person.

The second category of cases includes those where a private person has successfully petitioned a branch of government to act in a way that restrains trade, but in doing so was primarily motivated by the re-

strictions on competition brought about by the petitioning activity itself, and not by the action of the government. If a party would not have filed a lawsuit but for the injury it could inflict on its competition as a result of the litigation process itself (*i.e.*, discovery, delay, etc.), as distinguished from whatever relief the court ultimately might award, that lawsuit is a "sham" use of the judicial process even if some success is obtained, and should not be immune from antitrust challenge. In such cases the effort to obtain governmental action is a pretext to disguise a more crude intent to use the petitioning process itself to interfere with competition.

Petitioners ask this Court to adopt rules of law which will immunize admittedly anticompetitive conduct by persons who abuse their positions of public trust, or use the political or the judicial process as a pretext or cloak for predatory market conduct. Such an approach would improperly encroach upon the free market principles embodied in the antitrust laws without serving any legitimate federalist or First Amendment interests.

## ARGUMENT

### I. MUNICIPAL GOVERNMENTS ARE NOT IMMUNE FROM ANTITRUST CHALLENGE WHEN THEY ACT PURSUANT TO PRIVATE AGREEMENTS TO RESTRAIN TRADE AND NOT IN THE PUBLIC INTEREST

While state governments are entitled to special immunity under the antitrust laws because of federalist concepts in the Constitution, municipal governments, even though a branch of state government, are not



entitled to the same status.<sup>3</sup> The Court was divided on this issue in 1978. *Compare City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 411-13 (1978) (Opinion of Brennan, J.) *with* 435 U.S. at 426-34 (Opinion of Stewart, J.). But the question was decided by a unanimous Court in 1985, which held that municipalities "are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985).

Municipal governments may derive immunized status only if their actions are "authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'" *Town of Hallie*, *supra*, 471 U.S. at 38-39 (quoting *City of Lafayette*, *supra*, 435 U.S. at 413). But this Court has restricted the states' authority to grant immunity. In *Town of Hallie* this Court implicitly said that the states could not immunize local actions that were not undertaken in the public interest. In recognizing a limited immunity for municipalities, the Court said: "We may presume, absent a showing to the contrary, that the municipality acts in the public interest." *Town of Hallie*, *supra*, 471 U.S. at 45. The Court would not have noted the issue of whether the municipality

<sup>3</sup> The distinction between the treatment accorded states and that accorded municipalities by the federal courts under our Constitutional scheme is highlighted by the absence of any immunity for the latter under the Eleventh Amendment. In a unanimous decision, this Court held: "The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances . . . but does not extend to counties and similar municipal corporations." *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977).

was acting in the public interest if it were not relevant to the question of immunity. And, the Court would not have reserved a party's right to make "a showing to the contrary" if the presumption that the municipality had acted in the public interest was not rebuttable. Thus, a public interest limitation on municipal immunity was retained by the Court.<sup>4</sup>

A private party must be able to challenge the actions of municipal officials who choose not to act as government officials, but as private persons, serving private and not public interests.<sup>5</sup> To sustain such a

<sup>4</sup> The Court's decision to deny immunity to municipalities engaging in private antitrust agreements is consistent with limitations the Court has recognized in other contexts involving state and even federal authorities. *See Parker v. Brown*, 317 U.S. 341, 351-52 (1943) ("we have no question of the state or its municipalities becoming a participant in a private agreement or combination"); *United Mine Workers v. Pennington*, 381 U.S. 657, 671 (1965) ("the action . . . was the act of a public official who is not claimed to be a co-conspirator"). However, it would not be unreasonable, given the lesser status granted municipal governments in the federalist scheme, for the law to impose restrictions on the actions of local governments which are more strict than those imposed on the actions of state governments or branches of the federal government.

<sup>5</sup> This is not to suggest that the federal courts will be in the business of reviewing all municipal actions to determine if they are consistent with "a national code of ethics." Brief for Petitioners at 12. Courts will be looking at local government actions only when there is a properly asserted antitrust claim, and will be doing so only to decide the issue of immunity. While acting pursuant to a private undertaking outside the public interest is not in itself a federal offense nor a basis for court intervention, it may appropriately determine whether the municipality is entitled to a special grant of immunity with respect to conduct which is otherwise clearly illegal under the antitrust laws.



challenge, the plaintiff must show the elements of an antitrust violation,<sup>6</sup> and that the municipal government acted pursuant to a private agreement to restrain trade rather than in the public interest. Where there is sufficient evidence on these points, a private party should have the right to present its case to a jury.<sup>7</sup>

Allowing a private party to challenge actions by a municipal government in federal court under the antitrust laws is not contrary to fundamental policies nor an undue burden on local political processes. Truly legitimate governmental action is protected by the limited immunity recognized in *Town of Hallie*.<sup>8</sup> In

<sup>6</sup> Successfully showing that conduct is not immune does not establish that the conduct is an antitrust violation. To prevail, a plaintiff must meet the standard requirements of the Sherman Act. *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1247 n.7 (9th Cir. 1982), cert. denied, 459 U.S. 1127 (1983); I P. Areeda & D. Turner, *Antitrust Law* ¶ 201 (1978).

<sup>7</sup> At trial, cities will not be able to insulate their conduct by creative characterizations and contrived justifications. See *Nollan v. California Coastal Commission*, 483 U.S. 825, 841 (1987).

<sup>8</sup> There is no real encroachment on the authority of the states, for there is no reason to presume that states would want to authorize municipalities to act outside the public interest. Thus, actions by a municipality not undertaken in the public interest would also be outside the scope of those authorized by the state—i.e., “*ultra vires*”—and not immune. See, e.g., *Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810, 824-25 (11th Cir. 1990) (*ultra vires* conduct is not a foreseeable use of state grant of authority); *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733, 746 (8th Cir. 1982), cert. denied, 461 U.S. 945 (1983) (a conspiracy to thwart normal zoning procedures and to injure directly the plaintiffs by illegally depriving them of their property is not in furtherance of any clearly articulated state

addition, municipal governments are protected from baseless lawsuits by the tough strictures of Rule 11 of the Federal Rules of Civil Procedure (sanctions for unfounded claims). Colorable, but ultimately unsupported antitrust claims are weeded out by standards for summary judgment and directed verdicts that have been fine-tuned by this Court in recent decisions, including decisions involving antitrust cases. See *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The questions that would be presented to courts, and ultimately to jurors, in such cases would not be unlike those raised in other antitrust cases. Jurors may be asked whether the local government acted pursuant to an agreement with a private party to restrain trade or pursuant to a unilateral decision regarding what was in the public interest. This is precisely the type of question that courts and jurors face in classic distributor termination cases where a manufacturer receives complaints from some distributors before terminating another. See, e.g., *Monsanto Co. v. Spray-Rite Service Corp.*, *supra*, 465 U.S. at 764. The fact that the alleged co-conspirators are city officials and not corporate officers does not make the inquiry any more difficult, nor does it counsel in favor of any different standard.

policy); *Laidlaw Waste Sys., Inc. v. City of Ft. Smith*, \_\_\_ F. Supp. \_\_\_, No. CIV. 90-2134, slip op. at 4 (W.D. Ark. Aug. 8, 1990) (available on Westlaw, 1990 WL 119673) (“[A]lthough the Arkansas legislature intended to allow municipalities to authorize waste disposal monopolies, it did not intend to allow unfair competition by municipalities”).

Nor would this standard unduly interfere with a legislator's ability to obtain information from constituents. As articulated by this Court, the *Monsanto* standard recognizes that a manufacturer may properly solicit and obtain information from its distributors before making its unilateral decision to terminate a distributor pursuant to what the manufacturer believes to be the best interests of the distribution system it oversees. *Id.*, 465 U.S. at 763-64. Similarly, municipal officials are free to gain input from constituents so long as they ultimately exercise their public duties and act in the public interest and not pursuant to a private agreement to restrain trade. Adherence to the *Monsanto* standard would require the plaintiff to produce evidence that "tends to exclude the possibility" that the municipality acted independently, rather than pursuant to a private agreement to restrain trade—a tough standard that further insulates municipal officials from unfounded lawsuits.

These courtroom procedures and rules provide a meaningful way for trial courts to dispose of antitrust claims not deserving a trial. See, e.g., *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286, 1291 (11th Cir. 1986) (reversing denial of summary judgment in the *Parker* context). Where trials are appropriate, courts and juries are equipped to reach proper decisions.<sup>9</sup>

<sup>9</sup> *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1935) (jury trial is "generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases"); *Sioux City & Pacific Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1874) ("It is assumed that twelve men know more of the common affairs of life than does one man. . ."); *In re United States Financial*

Where the municipality is proven to have violated the antitrust laws, damage exposure is limited in appropriate cases by the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36.

Denial of a private party's right to challenge municipal action in appropriate circumstances would thwart important antitrust policies without justification. City governments are by nature parochial in their interests, and are prone to actions that may benefit narrow, local interests to the detriment of competition in the larger marketplace. See *City of Lafayette, supra*, 435 U.S. at 408 ("If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.") Moreover, it may often be an "outsider" that is the target of the anticompetitive effort. Such an "outsider" will lack the ability to participate effectively in the local political process, and would therefore lack any remedy if denied the judicial remedy. See *id.*, 435 U.S. at 406-07; see also *Wall v. City of Athens*, 663 F. Supp. 747, 760 (M.D. Ga. 1987) ("By furthering purely parochial interests through contracts in restraint of trade between city officials and private corporations, and by discriminating economically and commercially between residents of the city and residents outside the city, the city has en-

*Securities Litigation*, 609 F.2d 411, 431 (9th Cir. 1979), cert. denied, 446 U.S. 929 (1980) ("[N]o one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience that citizen-jurors bring to bear on a case.")



gaged in conduct outside of the protection of 'sovereign state policy.' ").

Federal courts may intervene in local government actions to protect important federal policies. *See, e.g., Golden State Transit Corp. v. City of Los Angeles*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 444, 107 L. Ed. 2d 420 (1990) (city held liable for compensatory damages under 42 U.S.C. § 1983 based on violation of National Labor Relations Act); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 67-72 (1981) (interference with rights guaranteed by the First and Fourteenth Amendments); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-39 (1973) (federal preemption); *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928) (taking of property without due process); *Buchanan v. Warley*, 245 U.S. 60, 81-82 (1917) (racial discrimination).<sup>10</sup> Antitrust is one of the most important federal policies. It is not asking too much to have the balance between antitrust and local political processes struck in such a way as to preserve a modest right to seek judicial review of local action that is undertaken as part of a private conspiracy and not in the public interest.

<sup>10</sup> A balancing of interests, rather than a pure "hands off" approach, is required when considering the extent to which a court should interfere in the legislative or executive process. While the judiciary should not lightly undertake to review the actions taken by the other branches of government, no government official or body should be above the law. An approach resulting in "qualified" immunization should be the norm. *Cf., Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

## II. MOTIVE SHOULD BE TESTED UNDER THE SHAM EXCEPTION TO THE NOERR-PENNINGTON DOCTRINE EVEN WHERE PETITIONING ACTIVITY IS SOMEWHAT SUCCESSFUL

The jury in this case found that Columbia Outdoor Advertising's predominant purpose in invoking the political process was to inflict injuries on its competitor which flowed from the use of the process itself, and not to obtain legitimate legislative action. The key evidence related to the continuing pressures placed upon the city council to enact, and later to defend, legislation that legal counsel had advised was unconstitutional. *See Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127, 1138-39 (4th Cir. 1989). Such conduct was found to be "sham" lobbying activity, and outside the protections of the *Noerr-Pennington* doctrine. *Id.* at 1139.

The petitioners and the dissent in the Fourth Circuit suggest that the firm's actions should be immune from challenge because those efforts were successful at least in part in obtaining governmental action—i.e., the passage of the unconstitutional ordinance. *See* Petition for a Writ of Certiorari at 13; *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, *supra*, 891 F.2d at 1147-49 (Wilkins, J., dissenting). Granting immunity based upon such an "objective" standard unnecessarily limits the applicability of the "sham" exception. Instead, a subjective test of motive is essential to give the "sham" exception life.

The "sham" exception is aimed at detecting those occasions where petitioning activity is a pretense or a sham, and therefore not deserving of special immunity from challenge under the antitrust laws. The



Court has decided to tolerate restraints on competition properly imposed by governmental acts, and therefore must also tolerate petitioning activity aimed at achieving such action by the government. But the Court has drawn the line and said that where the restraints on competition flow from the petitioning activity, and not from the actions ultimately taken by the government, then no special immunity is justified. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) (anti-trust liability not excused if conduct "is a mere sham").

The difficulty in framing a proper rule of law to define "sham" conduct arises from the fact that most conduct springs from more than one motive. A firm may seek passage of legislation favoring its business, while also noting that the uncertainties created by the pendency of the bill will have the effect of deterring entry by a new competitor even in the absence of enactment. Similarly, a firm may file a lawsuit against a competitor noting that it has some, although small, chance of success, while also realizing that the costs of litigating the case may be sufficient to drive the competitor from the market no matter how the lawsuit is ultimately decided.

The "objective" test chooses to simplify the world and say that if some success is achieved, then no further inquiry is required to determine if the petitioning process was abused. Under the "objective" test, any success, no matter how meager and no matter how much the result of luck rather than merit, is enough to displace the policies embodied in the antitrust laws. Such a rule of law goes too far in protecting conduct that is injurious, and suggests by

implication that our courts are not equipped to do better in distinguishing between proper and improper conduct.

Courts and judges are prepared to exercise their judicial duties by scrutinizing conduct and detecting pretextual petitioning activity. See, e.g., *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471-73 (7th Cir. 1982), cert. denied, 461 U.S. 958 (1983) ("The line is crossed when his purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself—regardless of outcome—of litigating."); *South Dakota v. Kansas City Southern Industries, Inc.*, 880 F.2d 40, 54 n.30 (8th Cir. 1989), cert. denied, \_\_\_ U.S. \_\_\_, 110 S.Ct. 726, 107 L. Ed. 2d 745 (1990) ("This is not to say that successful litigation shall categorically preclude a finding of sham."); *In re Burlington Northern, Inc.*, 822 F.2d 518, 527-28 (5th Cir. 1987), cert. denied, 484 U.S. 1007 (1988) ("The determinative inquiry is not whether the suit was won or lost, but whether it was significantly motivated by a genuine desire for judicial relief.") In *Grip-Pak* the Seventh Circuit stated:

[W]e are not prepared to rule that the difficulty of distinguishing lawful from unlawful purpose in litigation between competitors is so acute that such litigation can never be considered an actionable restraint of trade, provided it has some, though perhaps only a threadbare basis in law.

*Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, supra, 694 F.2d at 472.

The reluctance of these courts to adopt the "objective" test is based on the reality "that the 'usual

litigant will base its decision to sue on a number of factors,' " (*In re Burlington Northern*, *supra*, 882 F.2d at 528), and the observed use in the marketplace of pretextual petitioning activity, including litigation, to injure competitors. As the Seventh Circuit explained:

Many claims not wholly groundless would never be sued on for their own sake; the stakes discounted by the probability of winning, would be too low to repay the investment in litigation. Suppose a monopolist brought a tort action against its single, tiny competitor; the action had a colorable basis in law; but in fact the monopolist would never have brought the suit—its chances of winning, or the damages it would get if it did win, were too small compared to what it would have to spend on the litigation except that it wanted to use pretrial discovery to discover its competitor's trade secrets; or hoped that the competitor would be required to make public disclosure of its potential liability in the suit and this disclosure would increase the interest rate that the competitor had to pay for bank financing; or just wanted to impose heavy costs on the competitor in the hope of deterring entry by other firms. In these examples the plaintiff wants to hurt a competitor not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome.

*Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, *supra*, 694 F.2d at 472.

The "objective" test would so emasculate the sham exception to *Noerr-Pennington* that it would be "a

wise competitive strategy for a company to engage its competitors in expensive and protracted litigation, not because of any hope of success or intent to enforce the law, but merely to disadvantage and even destroy the competitor." Kintner & Bauer, *Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the Noerr-Pennington Doctrine*, 17 U.C. Davis L. Rev. 549, 571 n.94 (1984).<sup>11</sup>

Allowing courts and, where appropriate, juries to evaluate petitioning behavior under a subjective test

<sup>11</sup> Theoretical economists have suggested, and some courts have agreed, that actions taken to discipline competitors are not effective so long as entry and exit barriers are low. See, e.g., Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n.15 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, *supra*, 475 U.S. at 588-90; *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989). However, more recent thinking by economists has tended to coincide with what common sense tells us about human behavior: Firms, like the people that run them, do not like to be hurt or defeated. If firms are punished in the marketplace, they look elsewhere to do business, and others that might have entered that market will also look elsewhere. See, e.g., Ordover & Wall, *Proving Predation After Monfort and Matsushita: What the New Learning Has to Offer*, 1 Antitrust 5 (Summer 1987); Baker, *Recent Developments in Economics That Challenge Chicago School Views*, 58 Antitrust L. J. 645 (1989); Ordover & Saloner, *Predation, Monopolization and Antitrust*, 1 Handbook of Industrial Organization (R. Schmalensee and R.D. Willig, eds.) at 537-96 (1989). One writer noted that even where structural barriers to entry are low, "a lawn strewn with the lifeless corpses of failed entrants" may effectively deter new entry. Rapp, *Predatory Pricing Analysis: A Practical Synthesis* (Working paper presented before the American Bar Association Antitrust Section Spring Meetings, March 21, 1990). Thus, market disciplining behavior through sham petitioning can make rational economic sense.



for sham activities would not result in the imposition of undue risks on persons legitimately using governmental processes. The right to litigate an issue does not mean that the plaintiff will always have sufficient facts to withstand a motion to dismiss, to withstand a motion for summary judgment, to withstand a motion for directed verdict, or to gain a favorable jury verdict.<sup>12</sup> The facts will be tested in accord with established pretrial and trial procedures. A defendant charged with sham conduct may show that its conduct was successful. Depending on the evidence presented by the plaintiff to show pretextual motives, evidence of success may result in termination of the case at the motion stage, or successful resolution of the case at trial. See, e.g., *In re Burlington Northern*, *supra*, 822 F.2d at 528 ("Of course, the success of the claim presented is persuasive evidence that the litigant in fact wanted the relief."); *G. Heileman Brewing Co. v. Anheuser-Busch, Inc.*, 676 F.Supp. 1436, 1476 (E.D. Wis. 1987), *aff'd*, 873 F.2d 985 (7th Cir. 1989) (same). Pretrial and trial procedures refined by this Court in

<sup>12</sup> Those that argue in favor of simplistic rules like the "objective" test as a way of blocking entire classes of litigation do so based on the belief that the judicial system does not function well enough to protect them from frivolous claims, or otherwise brings about irrational results. Such a negative view of the judicial system is not warranted. Attorneys do not, on the whole, file lawsuits where the facts do not support a claim consistent with the law. If they do, there are stiff sanctions available under Rule 11 of the Federal Rules of Civil Procedure. If the facts are colorable, but later turn out to be too weak to proceed to trial, the system disposes of the case summarily. At trial, experience under our system suggests that juries act rationally and appropriately, even in complex cases. See cases at n.9, *supra*. Our system does not require artificial rules to "protect" the citizenry from a process gone amok.

recent decisions are sufficient safeguards against baseless or misdirected antitrust suits. See discussion at pp. 8-11, *supra*.

In contrast, the "objective" test would result in the filing of lawsuits or other petitioning activity that otherwise would not be pursued. As noted in *Grip-Pak*, a party may evaluate activity differently, and come to a different decision, when it perceives that limited opportunities for success will be augmented by benefits accruing from the process of petitioning without regard to success. *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, *supra*, 694 F.2d at 472. Allowing pretextual lawsuits to be prosecuted without the fear of antitrust liability could add to already overcrowded dockets. Moreover, there will be cases where legitimate plaintiffs may forego similar litigation, mistakenly believing that their interests are adequately protected, only to see the litigation abandoned or dismissed once its ancillary anticompetitive purposes have been achieved.<sup>13</sup>

The standards for evaluating pretextual petitioning activity under the sham exception must be such that a plaintiff will have a chance to prove that despite some success or chance of success, the activity would

<sup>13</sup> For example, a plaintiff may use environmental challenges to delay a project long enough to gain a competitive advantage or to bring about some change in the project unrelated to environmental concerns. Other environmental groups may choose not to spend limited resources challenging the project, thinking that the issues will be fully litigated. Later, having achieved the non-environmental purposes of the litigation, the plaintiff may settle or dismiss the suit. Such action would leave a void that cannot be filled effectively by the parties honestly interested in the issues others used as a pretext.



not have been undertaken but for the anticompetitive effects that flow from the petitioning activity itself, without regard to the outcome. Petitioning activity that is primarily or predominantly based upon the effects that flow directly from the activity, and not from any governmental action brought about by the activity, should be regarded as sham. *See, e.g., United States v. Otter Tail Power Co.*, 360 F.Supp. 451, 451-52 (D. Minn. 1973), *aff'd mem.*, 417 U.S. 901 (1974) (applying sham exception where litigation "designed principally" to preserve defendant's monopoly); *Bien, Litigation As An Antitrust Violation: Conflict Between The First Amendment And The Sherman Act*, 16 U.S.F. L. Rev. 41, 92 (1981) (sham exception applies where "the primary purpose behind the initiation of the litigation was to harm the defendant *directly* and not to pursue the cause of action"). Focusing on the strength of the motive to seek governmental action may also be appropriate, so long as the test is one which determines whether the intent to seek governmental relief would, standing alone, have been enough reason to engage in the activity. *See Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1372 (5th Cir. 1983), *reh. denied*, 699 F.2d 1163 (5th Cir. 1983) (sham exception will not apply where a genuine desire for governmental action is a "substantial factor" in the decision to engage in the petitioning activity). To be protected activity, the evidence should show that there are sufficient legitimate reasons for engaging in the activity other than the effects the activity will have on competitors without regard to success. *Cf., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604-05 (1985) (monopolist's conduct characterized as exclusionary where there were no valid business reasons for its actions).

## CONCLUSION

The balance between antitrust policy, federalism and the First Amendment is a delicate balance that is preserved in large part by careful scrutiny of the activities immunized by the *Parker* doctrine and the existence of a viable and meaningful "sham" exception to the *Noerr-Pennington* doctrine. Streamlined rules that seek simplistic solutions while striking an improper balance have no place in our legal scheme. Instead, a strong approach to detecting improper or sham activity is needed to protect important antitrust policies. For the reasons set forth above, this Court should affirm the vigorous application of the antitrust laws to local governments that abandon their public duties, and to persons who use governmental processes as a pretext to cover predatory conduct.

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